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Supreme Court of the United States

LOUIS A. BROWN

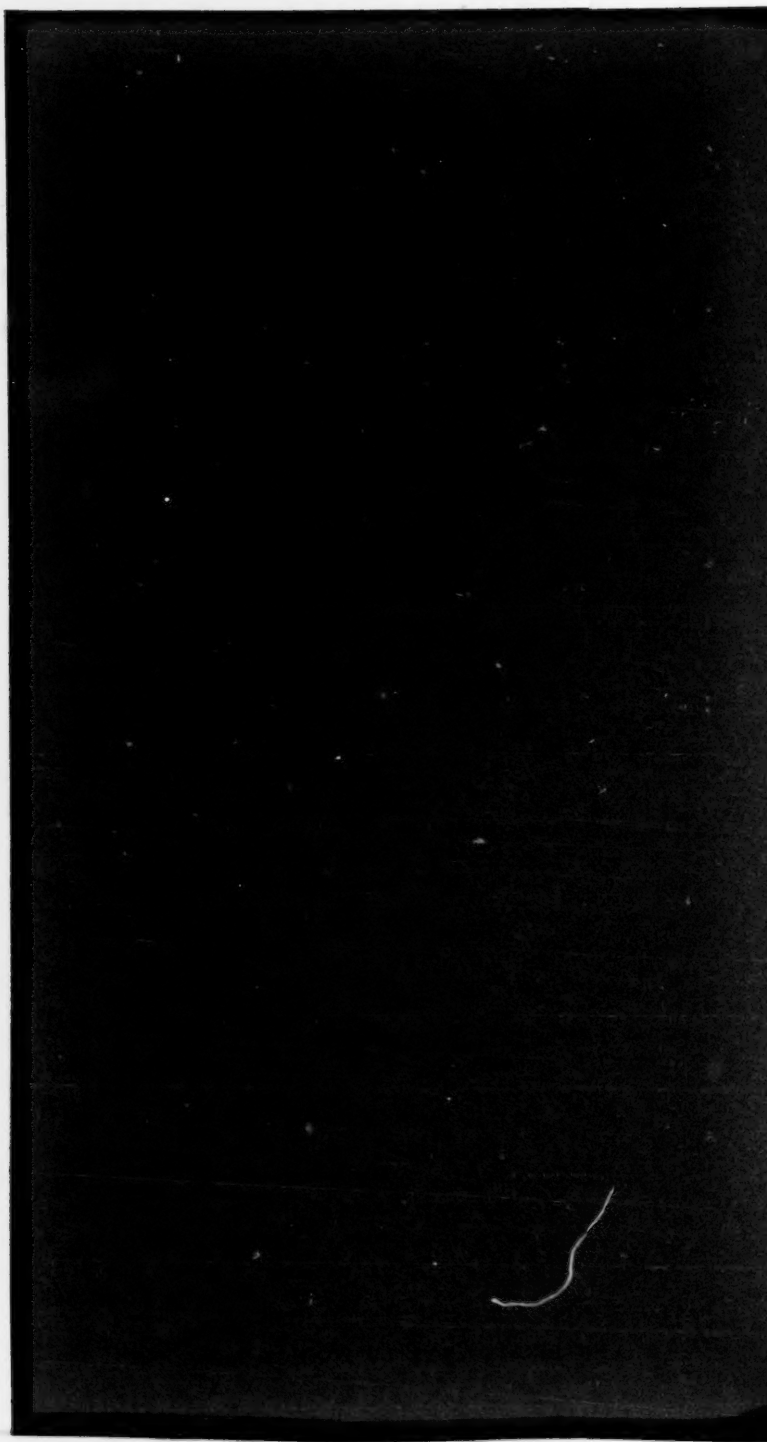
CHARLES R. LARSEN, JR.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

PERMANENT FOR CERTIORARI FILED

CERTIORARI GRANTED JUNE 24, 1970





## APPENDIX

### Supreme Court of the United States

OCTOBER TERM, 1970

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No. 325

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LOUIS A. NEGRE,

*Petitioner.*

*v.*

STANLEY R. LARSEN, ET AL.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 5, 1970

CERTIORARI GRANTED JUNE 29, 1970

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## RELEVANT DOCKET ENTRIES

50793 LOUIS A. NEGRE vs. STANLEY R. LARSEN et al.

## DATE

## PROCEEDINGS

1969

Feb. 14 Filed petn. for Writ of Habeas Corpus. SAW 243

26 Filed return to Order to show cause with pts. &amp; auths.

Mar. 5 Filed petnr's reply and traverse to resp's answer to petn. for writ of hav. corp. [sic]

13 Filed order denying petn. for writ of hab. corp., discharging the O.S.C. and dismissing the proceedings; the effect [sic] of this order is stayed 10 days from date to allow petnr. to seek fur. relief from Court of Appeals for the 9th Circ. (Zirpoli)

19 Filed petitioners' notice of motion and mo. for rehearing, new trial, ext. of stay pending decision and to amend judgment with supporting papers attached, Mar. 27, 69, 2:00 PM, before Judge Zirpoli.

27 Filed ord. denying rehearing and denying interlocutory relief and stay of ord. 10 days for pet. to seek fur. relief. (Zirpoli)

Apr. 2 Filed petitioners' notice of appeal.

Nov. 6 *Per curiam* decision affirming denial of petn. for writ of hab. corp.

1970

June 29 Order of Supreme Court granting petn. for writ of certiorari.



APPLICATION FOR REQUEST FOR DISCHARGE  
AS A CONSCIENTIOUS OBJECTOR  
UNDER AR 635-20

CO, USAPERSCEN (6020)

27 Jan 69

PVT LOUIS A. NEGRE

US 56 669 214

Request a discharge under the provisions of AR 635-20,  
based on religious beliefs.

1. General Information

- a. Louis Auguste Negre
- b. US 56 669 214
- c. 47-847-723
- d. USAOSRFLSTA, Oakland, California
- e. 501 Niles Street, Bakersfield, California
- f. St. Francis Catholic School  
grades 1-5  
Our Lady of Perpetual Help School  
grades 6-7  
Garces Roman Catholic High  
grade 8-12  
Bakersfield Junior College  
from Sep/65-Jun/67  
all the schools listed are in Bakersfield, California
- g. cook and bus boy at Maison Jaussand French Restaurant, 1001 S. Union Ave., Bakersfield, California, from Feb/64-induction
- h. 501 Niles Street, Bakersfield, California  
Jun/65-present  
515 Monterey Street, Bakersfield, California  
Jun/63-Jun/65  
1517 Baker Street, Bakersfield, California  
Jan/62-Jun/63  
3108 Linden Avenue, Bakersfield, California  
Jan/59-Jan/62  
2121 Palm Street, Bakersfield, California  
Aug/51-59

Nice, France  
Jul/47-Aug/51

- i. Father—Auguste Negre, 501 Niles Street, Bakersfield, California  
Mother—Martha Negre, 501 Niles Street, Bakersfield, California
- j. Both parents are Roman Catholic
- k. No.
- l. Not applicable, I have served over 180 days on active duty.
- m. I am willing to engage voluntarily in post-military work of the nature encompassed by the civilian work program administered by Selective Service.

## 2. Religious Training and Beliefs.

a. On February 26, 1968 I submitted an incomplete application for discharge as a conscientious objector to CPT Hill, an attorney at law, with the title and assignment of commanding officer of transient company at Oakland Army Terminal, California. SPT Hill entered upon extensive cross-examination of me about the application, ascertained that I would engage in force to protect my mother from attack, declared that my application was inconsistent and unacceptable and did hand the application back to me. CPT Hill stated that he would exercise every means within his power to cause me to board an airplane for Vietnam, stating that he meant both physical and other means.

I told CPT Hill that I would be obliged to refuse any order to debark for Vietnam to participate in any form in that war upon the ground that such participation would squarely violate my religious training and belief prohibiting such participation.

CPT Hill subsequently assigned men under his command to keep me in their company, in effect arresting me, and also stated to me that general court martial charges were to be brought against me for disobedience of orders.

I again advised CPT Hill that I filed my application for discharge as a conscientious objector, that I stood upon my religious training and belief whether he agreed to it or not, and that I would have to decline any participation in the war

in Vietnam upon the grounds of my religious training or belief, whatever action CPT Hill took.

Subsequently I was advised that court martial charges against me had been dropped, and that my application for discharge as a conscientious objector had been accepted for consideration. I was sent to a chaplain and a psychiatrist for interview. The psychiatrist stated to me during the interview that he accepted the sincerity of my claim as a conscientious objector.

The chaplain, a Methodist officer, found that I did object to becoming engaged in the military conflict in Vietnam, but did not find that my objection was based solely upon my religious training and belief, in view of the advice he had received from the Catholic chaplain regarding Catholic religious training and belief. Methodist chaplains understanding of Catholic training and belief subsequently proved to be erroneous. Because his report was not shown to me in February 1968, I was unable to correct the mistake at that time. Likewise, supporting letters attesting to my sincerity could be attached to my initial application because the officers at the Oakland Army Personnel Center kept me under escort, and did not allow me any time to obtain such letters from my religious adviser of my family and friends in Bakersfield.

Based upon the absence of supporting documentation establishing the nature of the Catholic religious training and belief, and based upon the mistaken statement by the Methodist chaplain of Catholic training and belief, an endorsement was attached to my initial application, repeating the erroneous characterization of Catholic training and belief and recommending disapproval of my first application.

Based upon the incomplete application and erroneous endorsements, the Department of the Army disapproved my initial application for separation stating:

"Application for separation disapproved since the evidence fails to meet criteria for separation. Request is not based upon sincere religious training and belief."

After filing the initial application, I did obtain official statement of the Catholic doctrine and creed in respect of military service, a letter from my religious adviser regarding the same, and letters from friends and family attesting to my sincerity.



Upon notice that the initial application had been denied, I therefore filed a second application about July 15, 1968, outlining a correct statement of the Catholic religious training and belief, and enclosing extensive evidence of sincerity.

The Commanding Officer of the Oakland Army Personnel Center determined that the second application was substantially the same as the first application, and refused to accept the second application. I advised the Commanding Officer of Transient Company that I would be obliged by my religious training and belief to refuse any orders to proceed to Vietnam to participate in the war there. The Commanding Officer said that I could not refuse an order in advance, and I would have to wait until I received the order to ship before I could refuse the order.

Declined the order upon the grounds that compliance was promatted by my conscience formed by my religious training and belief.

General court martial proceedings were held upon the charge of wilful disobedience of the order to proceed to Vietnam, and I was found not guilty of the charge.

The Methodist chaplain stated that he had not studied Catholic teaching in respect of conscientious objection and had relied upon advice from the Catholic chaplain. The Catholic chaplain subsequently testified that his colleague had mistakenly summarized the Catholic training and belief.

Chaplain (LTC) Richard, the Catholic chaplain, testified that the Catholic religion compels its members to refuse, object to or seek release from military service where such service violates the conscience of the individual Catholic. Each Catholic must form his own conscience in respect of military service. Thus, one Catholic may serve in good conscience, while another Catholic will find that his conscience prohibits military service. Under Catholic religious training and belief, each Catholic has a duty to follow his own conscience in respect of military service.

Following my acquittal at the general court martial proceedings, I renewed my application as a conscientious objector upon the grounds stated in this application. During the pendency of the court martial proceedings, the Catholic bishops of the United States including Archbishop Terence Cooke, bishop to Catholics in the US Armed Forces. They

issued a pastoral letter entitled "Human Life in our Day" on November 15, 1968, after their conference in Washington, D.C. The bishops' pastoral letter explicitly reaffirmed the Catholic doctrine of duty to conscience:

"As witness to a spiritual tradition which accepts enlightened conscience even when honestly mistaken, as the immediate arbiter of moral decisions, we can only feel reassured by this evidence of individual responsibility and the decline of uncritical conformism."

If war is ever to be outlawed, and replaced by more humane and enlightened institutions to regulate conflicts among nations, institutions rooted in the notion of universal common good, it will be because the citizens of this land and other nations have rejected the tenets of exaggerated nationalism and insisted on principles of non-violent political and civic action in both the domestic and international spheres.

We therefore join with the Council Fathers in praising "those who renounce the use of violence in the vindication of their rights and who resort to methods of defense which are otherwise available to weaker parties, provided that this can be done without injury to the rights and duties of others or of the community itself"

The bishops then call for liberalizing the laws recognizing conscientious objectors and concludes:

"Whether or not such modifications in our laws are in fact made, we continue to hope that, in the all-important issues of war and peace, all men will continue to follow their consciences. We can do no better than to recall, as did the Vatican Council, 'the permanent binding force or universal natural law and its all embracing principles,' to which 'man's conscience itself gives ever more emphatic voice.'"

The U.S. bishops pastoral letter is merely the latest reaffirmation in the long history of Catholic religious training and belief affirming that the duty to God is higher than the duty to man, and therefore that man must obey his conscience and refuse and refuse any command of the state to violate his conscience.

# 1. "Do good and avoid evil"

1. From the Act of Contrition: ". . . and I firmly resolve which are customarily an inducement to sin so that all such

with the help of your grace, to sin no more, and to avoid the near occasion of sin."

2. Vatican II, "Dogmatic Constitution on the Church," ch. IV, par. 36: "Moreover, let the laity by their combined efforts remedy any institutions and conditions of the world things may be conformed to the norms of justice and may favor the practice of virtue rather than hinder it."

## 2. Conscience

1. Vatican II, "Declaration on Religious Freedom," ch. I, par. 3: "On his part, man perceives and acknowledges the imperatives of the divine law through the mediation of the conscience faithfully, in order that he may come to God, for whom he was created.

2. Vatican II, "Pastoral Constitution of the Church in the Modern World," Part I, ch. 1 par. 16: "In the depths of his conscience, man detects a law which he does not impose upon himself, but which holds him to obedience. Always summoning him to love good and avoid evil, the voice of conscience can when necessary speak to his heart more specifically: do this, shun that. For man has in his heart a law written by God. To obey it is the very divinity of man; according to it he will be judged."

## 3. Revelation

1. "You shall not kill." (Exodus, 20:23)

2. "Blessed are the meek, for they shall inherit the earth." (Math. 5:4)

3. "You have heard that it has been said: an eye for an eye and a tooth for a tooth. But I say to you not to resist evil: but if one strike thee on the right cheek, turn to him also the other. And if a man will contend with thee . . . in judgment, and take away thy coat, let go thy cloak also unto him. And whosoever will force thee one mile go with him other two." (Math. 5:38-41)

4. "You have heard that it hath been said, thou shalt love thy neighbor and hate thy enemy. But I say to you, Love your enemies, do good to them that persecute and calumniate you." (Math. 5:43-4)

5. "These things I command you, that you love one another." (John, 15:17)

6. "Then Jesus said to him (Peter): Put up again they

sword into its place, for all that take the sword shall perish with the sword." (Math. 22:52)

7. "Thou shalt love thy neighbor as thyself." (Math. 22:39)

8. "Amen I say to you, as long as you did it to one of these my least brethren you did it to me." (Math. 25:40)

#### 4. Some contemporary Catholic Statements on War

1. John XXIII: "Therefore, in this age of ours which prides itself on its atomic power, it is irrational to believe that war is still an apt means of vindicating violated rights."

2. Paul VI before United Nations: "If you wish to be brother, let the weapons fall from your hands . . . No more war. War never again."

3. Cardinal Ottaviani: ". . . today it is impossible in waging war to fulfill the conditions which in theory make war lawful and just. Nowhere can there be a cause proportionate or of such importance as to justify so much evil, slaughter and destruction, and moral and religious ruin. In practice then, it will never again be lawful to declare war."

4. American Bishops, Nov. 1968: "The threats of life depend on urgent and difficult decisions concerning war and peace. In considering these we share the convictions of Vatican Council II that the horror and perversity of technological warfare 'compel us to undertake an evaluation of war with an entirely new attitude.'"

#### 5. The Catholic Church and Conscientious Objection

1. Vatican II, "The Church Today," par. 79: "Moreover, it seems right that laws make humane provisions for the case of those who for reasons of conscience refuse to bear arms, provided, however, that they accept some other form of service to the human community."

2. American Bishops, Nov. 1968: They question the morality of modern warfare and they praise those who object for reasons of conscience. They also show how this objection can be founded on the teachings of Christ and the teachings of the Roman Catholic Church, interpreting Christ's message.

"Nor can it be said that such conscientious objection to war, as war is waged in our times, is entirely the result of subjective consideration and without reference to the mes-

sage of the Gospel and the teaching of the Church; quite the contrary, frequently conscientious dissent reflects the influence of the principles which inform modern papal tradition of moral doctrine in the Church, including, in fact, the norms for the moral evaluation of a theoretically just war."

Then the document goes on to praise the efforts to sincere people and reaffirms the right for conscientious objectors, activity and its consciences less inhuman. Such are conventions concerning the handling of wounded or captured soldiers, and various similar agreements. Agreements of this sort must be honored. Indeed they should be improved upon so that they can better and more workably lead to restraining the frightfulness of war.

"All men, especially government officials and experts in these matters, are bound to do everything they can to effect these improvements. Moreover, it seems right that laws make humane provisions for the case of those who for reasons of conscience to bear arms, provided however, that they accept some other form of service to the human community.

"But it is one thing to undertake military action for the just defense of the people, and something else again to seek the subjugation of other nations. Nor does the possession of war potential make every military or political use of it lawful. Neither does the mere fact that war has unhappily begun (sic) mean that all is fair between the warring parties." (Sec. 79)

"80. The horror and perversity of war are immensely magnified by the multiplication of scientific weapons. For acts of war involving these weapons can inflict massive and indiscriminate destruction far exceeding the bounds of legitimate defense. Indeed, if the kind of instruments which can now be found in the armories of the great nations were to be employed to their fullest, an almost total and altogether reciprocal slaughter of each side by the other would follow, not to mention the widespread devastation which would take place in the world and the deadly aftereffects would be spawned by the use of such weapons.

"All these considerations compel us to undertake an evaluation of war with an entirely new attitude. The men of our time must realize that they will have to give a somber reckoning for their deeds of war. For the course of the future will depend largely on the decision they make today.

"With these truths in mind, this most holy Synod makes its own the condemnations of total war already pronounced by recent Popes, and issues the following declaration:

"Any act of war aimed indiscriminately at the destruction of entire cities or of extensive areas along with their population is a crime against God and man himself. It merits unequivocal and unhesitating condemnation.

"The unique hazard of modern warfare consists in this: it provides those who possess modern scientific weapons with a kind of occasion for perpetrating just such abominations. Moreover, through a certain inexorable chain of events, it can urge men on to the most atrocious decisions. That such in fact may never happen in the future, the bishops of the whole world, in unity assembled, beg all men, especially government officials and military leaders, to give unremitting thought to the awesome responsibility which is theirs before God and the entire human race." (See 80)

"In the depths of his conscience, man detects a law which he does not impose upon himself, but which holds him to obedience. Always summoning him to love good and avoid evil, the voice of conscience when necessary speaks to his heart: do this, shun that. For man has in his heart a law written by God; to obey it is the will and dignity of man; according to it he will be judged. Conscience is the most secret core and sanctuary of man. There he is alone with God, whose voice echoes in his depths. In a wonderful manner conscience reveals that law which is fulfilled by love of God and neighbor." (See 16)

". . . the Council wishes to recall first of all the permanent binding force of universal moral law and its all embracing principles as man's conscience itself gives even more emphatic voice to these principles. Therefore, actions which deliberately conflict with these same principles as well as orders commanding such actions, are criminal. Blind obedience cannot excuse those who yield to them." See 79

The foregoing pronouncements were made by His Holiness, Pope Paul VI after consultation with the Fathers of the Sacred Council, and announced on December 7, 1965.

Pope John XXIII: "Since the right to command is required by the moral order and has its source in God, it fol-

lows that, if civil authorities legislate for or allow anything that is contrary to that order and therefore contrary to the will of God, neither the laws made nor the unauthorizations granted can be binding on the consciences of the citizens of US, since God has more right to be obeyed than men." (Pacem in Terris, page 142a, April 11, 1963)

In my 12 years in a Roman Catholic School at St. Francis Elementary School, Our Lady of Perpetual Help Junior High School, and Garces High School in Bakersfield, California, I have always been taught and I firmly believe that teaching of the Popes of the Church in matters of religious faith and morals is binding upon all Catholics, clergy or laity, military or civilian. For myself, I accept the teaching of his Holiness Pope Paul VI as announced in the Pastoral Constitution as binding upon my conscience, in conformity to my religious training and belief. I likewise accept the teaching of Pope John XXIII.

6. I likewise accept as part of my religious training and belief the Catholic teaching that I must examine and form my conscience based upon the best information I can gather; that I cannot be willing to commit evil by acting with a doubtful conscience, merely hoping that my conduct is not contrary to conscience. Equally, I accept my religious training and belief that where my conscience is certain, I must obey the order of conscience.

7. My conscience is not without information about the war in Vietnam. In fact my information actually relates back to the time of my childhood. In 1952 my family moved from France to the United States in search of freedom and peace. It was at the time that France was engaging in conflict with Indo-China, the present-day Vietnam.

It was in the hope of saving me from such an atrocity that we left France and re-established our home in the United States. I have been living in this country ever since 1952. I attended Catholic grammar school and high school, learning and practicing the laws set down by Our Lord Jesus Christ.

All through my life I was never in trouble with law. I have also felt and still do that violence will never solve anything. Violence will only prove one point and that is that one side or party is stronger than the other in this material life. Nevertheless the fact concerning one's ideals would not be changed by force, only by reason.



I believe that each individual on this earth was created to the image and likeness of God, regardless of race or creed. Each individual has his own convictions on living and pleasing God. None of us living have the true authority on convicting someone to our standards of our society. Also, because an individual has different customs and beliefs than us, who are we as a nation to decide that what they are doing is wrong and we must change their beliefs to suit ourselves.

In pertaining to the war in Vietnam the North Vietnamese people are fighting for their fundamental beliefs which they were brought up to believe. According to our standards they are wrong in their action, but in reality who is to say which nation is right in their beliefs before God. Sure we can say we are right and they are wrong, but one cannot forget that they too are human beings as ourselves and have the right to form opinions and make decisions as we are capable of doing. Now if they are wrong in their actions, surely they will pay, if not in this life in the world to come, for their misdeeds, just as we will if we are wrong.

The fact still remains that we have no authority to condemn them in their actions or pressure them by fighting and killing them. As I stated before, war is no answer to peace. War only solves the point of which country is stronger. Despite the amount of force used on an individual, his basic beliefs will always remain, just as long as he has an ounce of breath in him and he really believes it without doubt.

I was inducted in the Army of the United States of America at the Fresno induction center on August 29, 1967. At that time I had my own convictions about the war in Vietnam. And the Army's goal. Nevertheless I agreed to myself that before making any decision or taking any type of stand on the issue I would permit myself to see and understand the Army's explanation of its reasons for violence in Vietnam. For, without getting an insight on the subject, it would be unfair for me to say anything, without really knowing the answer.

I completed my basic training at Fort Lewis, Washington, in Company E-2. From there I was sent to Fort Polk, Louisiana, for advanced infantry training. It was there, upon completion of that training, that I knew that if I would permit myself to go to Vietnam I would be violating my own concepts of natural law and would be going against all that



I had been taught in my religious training. To contribute to the war in Vietnam would be in contravention of my own conscience and my moral beliefs. For one must not forget the purpose for which we as men were put on earth. That purpose was to please God, our Creator, for at the end of the world one is unable to bring with him the material things which he has accumulated while on earth. It is on that day that judgment will be passed on every man on the manner he served God and followed his conscience, given by God.

I cannot personally believe that by being in Vietnam we are helping the people there as we say. Have you ever stopped to think all the harm we have brought to that country? We, as being there, are not only destroying their homes, but also are taking the lives of people who were brought up on the very soil who are fighting to preserve their beliefs. We are depriving the individual of the right to live, if we feel he or she is a threat to a village. In Vietnam the individual soldier has the power to kill anyone whom he thinks is wrong.

Such power should not be distributed to one's will for only God has the right to take the life of an individual. If we are in Vietnam to help them why are we denying and persecuting the people who have different beliefs than we do. That is exactly what we are doing there today, murdering and slaughtering human beings like ourselves for the mere fact that an individual does not see the same things you see. Could anyone in his right mind kill his brother over a disagreement in principles or beliefs? Yet all of us on earth are brothers all striving to serve God the best way we can, despite which course is taken. For as you well know there are various different routes to be taken to arrive at a certain destination.

7. For the past six months, I worked as a clerk in Co. C. SPD and during the time before that I worked at the Hospital, Fort Ord, California. I have done my best to do a conscientious job and have done my best to be promoted from private to private first class.

After giving the deepest respect to the teaching and statements of my superiors in the Army, I nevertheless am obliged to follow my conscience: I am obliged by my conscience, under my religious training and beliefs, to refuse participation in any form in the war in Vietnam. Whether

or not I am subjected to threats, pressure or coercion in any form, or punishment, my conduct must be the same. I cannot act in violation of my conscience. If the Department of the Army says that I am insincere, I am sorry that I cannot persuade them of my sincerity, and I nevertheless may not act in violation of my religious training and belief, and my conscience.

My decision will not be different no matter how many sets of orders are printed or given to me without notice, or how many times the name or number of the company to which I may be assigned is changed.

Likewise, I must follow my religious training and belief whether or not they meet the test fixed by the laws of the United States for conscientious objection, for the duty we owe to God, to serve God and please God, is higher than the duty we owe to any man or any nation.

My family came to America in search of peace, and in search of freedom of conscience. I believe that the American law and constitution do allow freedom of religion and of conscience.

In respect of non-combatant duty in the Army I must say in honesty that my duty in the Fort Ord Hospital has not appeared to me to constitute a direct participation in the war in Vietnam. Equally however, honesty requires me to say that I would refuse duty as a clerk or medical corpsman in Vietnam as I would refuse infantry combat duty in Vietnam. The medical corpsman in Vietnam restores the combat soldiers to combat if they are sick or wounded. I believe that most of the men injured in Vietnam received very quick treatment and immediately return to combat. Restoring combat soldiers to condition to engage in the very killing which my religious training and belief prohibits cannot in any way satisfy the dictates of conscience.

I recognize that paying taxes or performing any service or work in the United States contributes in a way to the killing in Vietnam. But such service or work in the United States also contributes to the proper aims of supporting peaceful American life. After careful thought I believe that work such as that in the Hospital Company at Fort Ord is not so different from ordinary employment in the United States or alternative civilian service as to be prohibited by conscience, because such service in the Army in the United

States is only remotely connected with the killing and injury inflicted in Vietnam.

Therefore, while I cannot in conscience accept or perform any service in Vietnam because it would directly assist, I would be prepared to perform noncombatant hospital service in the United States because such service is not directly in aid of the Army forces in Vietnam.

Assignment to medical corpsman or like "non-combatant" duty in Vietnam I would be obliged to refuse upon the grounds of religious training and belief.

8. I have attached as enclosures letters regarding my religious training and belief from any family and religious advisers.

For the reasons stated I request that I be classified as a conscientious objector on the grounds of religious training and belief, and either discharged or granted bona fide non-combatant assignment in the United States which is not in direct support of the killing and injury in Vietnam.

At present I feel that I could not conceive participation in any war.

10 Incl

Louis Negre, PVT, US 56 669 214

1. Excerpts from Austin Fagothey, S.J., *Right and Reason, Ethics in Theory and Practice*, 1967.

2. Letter from James E. Straukamp, S.J.

3. Letter from Alice Chanley.

4. Letter from Maison Jaussaud.

5. Letter from John E. Cottalorda.

6. Letter from Mrs. Marcelle Johnson.

7. Letter from Auguste Negre and Martha Negre.

8. Letter from Cpt Daniel G. Harris.

9. Letter from SP 4 Robert R. Land.

10. Booklet.

AUSTIN FAGOTHEY, S.J., Professor of Philosophy, Univ. of Santa Clara, Santa Clara, California. *Right and Reason, Ethics in Theory and Practice*, 1957.

Imprimatur: Joseph T. McGuchter, STD, Archbishop of San Francisco, October 25, 1966.

in this life. Scrupulosity can be a serious form of spiritual self-torture, mounting to neurotic anxiety, that is more of a psychological than an ethical condition. The person needs to learn, not the distinction between right and wrong, which he may know very well, but how to stop worrying over groundless fears, how to end his ceaseless self-examination and face life in a more confident spirit.

Having seen what conscience is and the main forms it takes, we must now discuss our responsibility in following what conscience approves or disapproves. There are two chief rules, each of which involves a problem:

- (1) Always obey a certain conscience.
- (2) Never act with a doubtful conscience.

#### ALWAYS OBEY A CERTAIN CONSCIENCE

Notice the difference in meaning between a certain and a correct conscience. The term *correct* describes the objective truth of the person's judgment, that his conscience represents the real state of things. The term *certain* describes the subjective state of the person judging, how firmly he holds to his assent, how thoroughly he has excluded fear of the opposite. The kind of certitude meant here is a subjective certitude, which can exist along with objective error. Hence there are two possibilities:

- (1) A certain and correct conscience
- (2) A certain but erroneous conscience

1. A *certain and correct conscience* offers no difficulty and our obligation is clear. The person judges what conduct is required of him here and now. His judgment is correct and he is certain of its correctness.

What degree of certitude is required? It is sufficient that the conscience be *prudentially certain*. Prudential certitude is not absolute but relative. It excludes all *prudent* fear that

the opposite may be true, but it does not rule out imprudent fears based on bare possibilities. The reasons are strong enough to satisfy a normally prudent man in an important matter, so that he feels safe in practice though there is a theoretical chance of his being wrong. He has taken every reasonable precaution, but cannot guarantee against rare contingencies and freaks of nature.

In moral matters strict mathematical certitude (metaphysical certitude, the opposite of which is a contradiction) or even the certitude of physical events (physical certitude, the opposite of which would be a miracle) is not to be expected. When there is question of action, of something to be done here and now, but often involving future consequences some of which are dependent on the wills of other people, the absolute possibility of error cannot be wholly excluded; but it can be so reduced that no prudent man, no one free from neurotic whimsies, would be deterred from acting through fear of it. Thus a prudent man, having investigated the case, can say that he is *certain* that this business venture is safe, that this criminal is guilty, that this employee is honest. Prudential certitude, since it excludes all reasonable fear of error, is much more than high probability, which does not exclude such reasonable fear. One may, of course, define certitude so strictly as to make it mean absolute certitude only; but such a one is quarreling over mere words and must find another term to indicate what we have been describing in common language.

2. What happens when one has an *erroneous conscience*? Of course, if the error is *vincible*, it must be corrected. The person knows that he may be wrong, is able to correct the possible error, and is obliged to do so before acting. But a *vincibly erroneous conscience* cannot be a *certain conscience*. This is seen by asking how any conscience can become *vincibly erroneous*. A man may merely have a probable opinion which he neglects to verify, though able to do so. Or he may once have judged certainly yet erroneously, and now begins to doubt whether his judgment was correct or not. As long as he did not realize his error, his conscience was *invincibly erroneous*; the error has become *vincible* only because he is no longer subjectively certain and has begun to doubt. A *vincibly erroneous conscience* is therefore a name for a conscience that was either doubtful from

the beginning or else was once subjectively certain but erroneous, and has now become a doubtful conscience. It will be handled under the discussion of doubtful conscience.

If the error is *invincible*, we seem to have a dilemma. On the one hand, it does not seem right that person should be obliged to follow an erroneous judgment; on the other hand, he does not know that he is in error and has no means of correcting it. We solve the apparent dilemma by remembering that conscience is a subjective guide to conduct, that invincible error and ignorance are unavoidable, that any wrong which occurs is not done voluntarily and hence is not chargeable to the agent. A person acting with an invincibly erroneous conscience may do something that is objectively wrong, but since he does not recognize it as such, it is not subjectively wrong. The person is free of moral responsibility by the invincible ignorance bound up in his error.

Hence a certain conscience must be obeyed, not only when it is correct, but even when it is invincibly erroneous. Conscience is the only guide a man has for the performance of concrete actions here and now. But an invincibly erroneous conscience cannot be distinguished from a correct conscience. Therefore if one were not obliged to follow a certain but invincibly erroneous conscience, we should be forced to the absurd conclusion that one would not be obliged to followed a certain and correct conscience.

The will depends on the intellect to present the good to it. Whether the intellect's judgment is correct or not, the will act is good if it consents to the good presented by the intellect and it is bad if it consents to what the intellect judges evil. If a man is firmly convinced that his action is right, he is choosing the good as far as he can; if he is firmly convinced that his action is wrong, he is choosing what he thinks to be evil, whether it really is so or not. He is not responsible for the error, but he is for his choice.

### NEVER ACT WITH A DOUBTFUL CONSCIENCE

The man who is acting with a certain but invincibly erroneous conscience is avoiding moral evil as far as he can. It is not his fault that his judgment is mistaken and he has no reason for believing that it is mistaken. But the same cannot be said of one who acts with a *doubtful* conscience.

He has reason for believing that his intended act may be wrong, yet he is willing to go ahead and perform it anyway. True, he is not certain that he will do wrong. The man has no care for right or wrong, and if his act turns out to be objectively right this is only accidental. Therefore one must never act with a doubtful conscience.

What, then, should a person with a doubtful conscience do? His first obligation is to try to solve the doubt. He must reason over the matter to see if he cannot arrive at a certain conclusion. He must inquire and seek advice, even of experts if the matter is important enough. He must investigate the facts in the problem and make certain of them, if possible. He must use all the means that normally prudent people are accustomed to use, in proportion to the importance of the problem. Before deciding on an important course of action, business and professional men take a great deal of trouble to investigate a case, to secure all the data, to seek expert advice, besides thinking over the matter carefully themselves. The same seriousness is demanded in moral affairs.

What is the doubt cannot be solved? It may happen that the required information cannot be obtained because the facts are not recorded or the records are lost or the law remains obscure or the opinions of the learned differ or the matter does not admit of delay for further research. If one should never act with a doubtful conscience, what can one in doubt do? It may seem that the answer is easy: do nothing. But often this will not help, for omissions can be voluntary and the doubt may concern precisely the question whether we are allowed to refrain from acting in this case.

The answer to the difficulty is that every doubtful conscience can in actual practice be turned into a certain conscience, that no one need ever remain in doubt about what he must do. If the *direct method* of inquiry and investigation described has been used and proved fruitless, we then have recourse to the *indirect method* of forming our conscience by the use of reflex principles. Note that we are not offered a choice between either the direct or the indirect method. We *must* use the direct method *first*. Only when the direct method yields no result may we go on to the indirect method.

### FORMING ONE'S CONSCIENCE

The doubting person who has exhausted the direct method



without getting the knowledge has really a double doubt:

(1) What is the actual truth on the matter in hand?

(2) What is one obliged to do in such a situation?

The first is the *theoretical* or *speculative* doubt, and this is the question that cannot be answered, because the direct method was used and failed to yield results. The second is the *practical* or *operative* doubt, and this alone we claim can be solved in every instance.

Though many doubts are invincible theoretically, every doubt is vincible practically. A person can become certain of what he is obliged to do, how he is expected to act, what conduct is required of him, while remaining in a state of unsolved theoretical doubt. Thus, though the rightness or wrongness of the action is not settled in the abstract, this man becomes certain of what he in these actual circumstances is obliged or allowed to do, and therefore he acts with a certain conscience. In other words, he finds out the kind of conduct that is *certainly* lawful for a *doubting* person. This process of solving a practical doubt without touching the theoretical doubt is called *forming one's conscience*.

## REFLEX PRINCIPLES

The process of forming one's conscience is accomplished by the use of *reflex principles*, so called because the mind uses them while reflecting on the state of doubt and ignorance in which it now finds itself. Two such principles are of application here:

(1) Take the morally safer course.

(2) A doubtful law does not bind.

## THE MORALLY SAFER COURSE

By the *morally safer* course we mean the one which more surely preserves moral goodness, more certainly avoids wrongdoing. Often it is physically more dangerous. Sometimes neither alternative appears morally safer, but the obligation on each side seems equal; then we may do either.

One is always *allowed* to choose the morally safer course. If a man is certainly not obliged to act but doubts whether or not he is allowed to act, the morally safer course is to omit the act; thus if I doubt whether this money is justly



mine, I can simply refuse it. If a man is certainly allowed to act but doubts whether or not he is obliged to act, the morally safer course is to do the act; thus if I doubt whether I have paid a bill, I can offer the money and risk paying it twice.

Sometimes we are *obliged* to follow the morally safer course. We must do so when there is an end certainly to be obtained to the best of our power, and our doubt merely concerns the effectiveness of the means to be used for this purpose. Here the undoubted obligation to attain the end implies the obligation to use certainly effective means. A doctor may not use a doubtful remedy on his patient when he has a sure one at hand. A lawyer may not choose to defend his client with weak arguments when he has strong ones to present. A hunter may not fire into the bushes if he doubts whether the moving object is a man or an animal. A merchant may not pay a certainly existing debt with probably counterfeit coin or advertise probably damaged articles as first class goods. In such cases the person's obligation is certain and he must use means that will certainly fulfill it.

But there are other cases in which the obligation itself is the thing in doubt. Here we have a very different question. The morally safer course, though always allowable, is often costly and inconvenient, sometimes heroic. Out of a desire to do the better thing we often follow it without question, but, if we were obliged to follow it in *all* cases of doubt, life would become intolerably difficult. To be safe morally, we should have to yield every doubtful claim to others who have no better right, and thus become victims of every sharper and swindler whose conscience is less delicate than ours. Such difficulties are avoided by the use of the second reflex principle a doubtful law does not bind.

## A DOUBTFUL LAW

The principle, *a doubtful law does not bind*, is applicable only when I doubt whether or not I am bound by an obligation, when my doubt of conscience concerns the *lawfulness or unlawfulness* of an act to be done. It applies to the moral law as well as to human laws. I may use this principle in both the following situations:

- (1) I doubt whether such a law exists.
- (2) I doubt whether the law applies to my case.

For example: I may doubt whether the game laws forbid me to shoot deer on my farm, whether the fruit on my neighbor's tree hanging over my fence belongs to him or to me, whether I am sick enough to be excused from going to work today, whether the damage I caused was purely accidental or due to my own carelessness. It is true that there are contained here questions of fact that cannot be settled, but they all bring up questions of lawfulness or permissibility of action: Am I allowed to shoot the deer, to pick the fruit, to stay home from work, to refuse to repair the damage? Does any law exist, applicable to my case, which certainly forbids me? If the direct method fails to prove any, then I am morally justified in doing these things on the principle that a *doubtful law does not bind*.

The reason behind this principle is that promulgation is of the essence of law, and a doubtful law is not sufficiently promulgated, for it is not sufficiently made known to the person about to act here and now. Law imposes obligation, which is usually burdensome, and he who would impose an obligation or restrict the liberty of another must prove his right to do so. A man is presumed free until it becomes certain that he is restrained, and therefore a doubtfully existing restraint or law loses its binding force.

Be careful to distinguish these cases from those which fall under the other principle. If the obligation itself is the thing in doubt, I am not obliged. If the obligation is certain and only the means of carrying it out are doubtful, I may not use doubtful means if certain ones are available. I may not roll boulders down a hill in the mere hope that they may not hit anyone on the road below, but I may cart off boulders from property that is only probably mine. I may not leave poisoned feed about on the chance that no one will care to eat it, but I may manufacture clearly labeled poison if such manufacture is only probably forbidden by law. In the first instances there is no doubt about the law: I am not allowed unnecessarily to jeopardize human life. It may happen that no harm results, but the acts are certainly dangerous and *the morally safer course must be chosen*. In the second instances the law itself of not seizing others' property or of not manufacturing certain products is of doubtful application to my case, and I may take advantage of the doubt in my favor, for a *doubtful law does not bind*.

How doubtful does the law have to be to lose its binding force? Must the existence or application of the law be more doubtful than its nonexistence or nonapplication of the law be more doubtful than its nonexistence or nonapplication, or equally so, or will any doubt suffice to exempt one from the obligation? Such questions were hotly debated during the seventeenth and eighteenth centuries, more by moral theologians than by philosophical ethicists. The view that survived as the most tenable in theory and the only one workable in practice is called *probabilism*. It does not require a weighing of probabilities on either side of the case, but merely requires that be *solidly probable* that a law does not exist or does not apply to my case for me to be free from its obligation. Solid probability means that the reasons against the law's existence or application are not frivolous or fictitious but valid and weighty, even though they may not be more so than the reasons in favor of the law. No proposition can be certain if there are valid and weighty reasons against it. If it is not certain it is doubtful, and if it is doubtful it does bind. To list all the reasons on both sides and weigh their relative merits is often a hopeless task, baffling the best experts. The average man has neither time nor knowledge nor ability for such a comparison. In practice decisions must be made promptly, and yet be made with a certain conscience. The theory of probabilism enables one to do so.

## CONCLUSION

The whole matter of forming one's conscience may seem to involve a great deal of subtlety, as if we were whittling down moral obligation to its lowest terms. Is this not contrary to straightforward simplicity and sincerity? In answer, the first thing to note is that one can always follow the morally safer course. But in ethics we are studying not only what is the better, nobler, and more heroic thing to do, but also exactly what a man is strictly obliged to do. A generous man will not haggle over good works, but an enlightened man will want to know when he is doing a strict duty and when he is being generous.

Accurate moral discrimination is particularly necessary in judging the conduct of others. In our personal lives we may be willing to waive our strict rights and to go beyond

the call of duty, but we have no business imposing on others an obligation to do so. The borderline between right and wrong is difficult to determine. It is foolish to skirt it too closely, but we are not allowed to accuse another man of wrongdoing if he has not done wrong. This is why we were obliged to detail these principles so carefully.

It seems that civil rights demonstrations, to be morally acceptable, must be:

- (1) For the common good and not for special privilege
- (2) For natural rights and personal dignity
- (3) For civil rights granted but not implemented
- (4) Only after legal channels have proved fruitless
- (5) Conducted in a peaceful and orderly manner
- (6) By mature, concerned, and responsible people
- (7) Under competent leadership able to restrain excesses
- (8) With proportionate means and minimum disturbance
- (9) For the betterment of society, not its disruption

It is the business of each government to guarantee in practice to its minorities, racial or other, the rights that are due them in social justice and in respect for their human dignity, so that there will be no further need for civil rights demonstrations. On the other hand, minorities should not get the idea that everything should be done for them independently of their own effort. What they have a right to is equal and undiscriminated facilities and opportunities, but the use of them is their own responsibility. Here we have a difficult problem in minority leadership.

## REBELLION AND REVOLUTION

Rebellion is open, organized, and armed resistance to constituted authority. Revolt, insurrection, and sedition are more localized forms of the same thing. There will always be malcontents and disaffected groups even in the best of human societies. For the common good a government must try to keep them contented, which it can best do by scrupulous regard for minority rights, but no authority can allow itself to be openly defied. Since the state has the right to exist, it also has the right to put down rebellion by all efficient and legitimate means.

What if rebellion is provoked by abuse of power on the

part of the ruler? Abuse of power does by itself take away the right to power. A father unjustly punishing his son does not lose his paternal right, nor does a man putting his money to unjust use lose the ownership of it. Small abuses of power are occurring constantly and serious ones occasionally in every state, because rulers are only human and fallible. Such causes cannot justify rebellion, though they call for protest and redress.

What may a private citizen do when he is unjustly oppressed? Unjust laws are not at all and can impose no moral obligation. Injustice in a law must not lightly be presumed but clearly established.

1. Passive resistance or nonobedience is required if the citizen is ordered to do something intrinsically wrong, for no human law can cancel the already existing obligation of the natural law. A so-called law which is unjust but does not order the doing of something intrinsically wrong may be resisted or obeyed, as the subject thinks expedient. It is wrong to do injustice but not to suffer injustice. To prevent greater evils one may have an incidental obligation to obey. But one must never do an act that is intrinsically wrong, no matter what the penalty.

2. Active resistance without physical force, by petitions, speeches, protests, books, pamphlets, editorials, and propaganda of all sorts, is always morally allowed against unjust laws and tyrannical rulers. But it is characteristic of tyrants to deny any opportunity for such peaceful methods.

3. Active resistance with physical force is allowed against a tyrant attempting to inflict grave personal injury, for the ruler in this case becomes an unjust aggressor. Such resistance may be extremely inexpedient, but it is not morally wrong. The rules of a blameless self-defense must be observed. If some citizens are unjustly attacked by a tyrannical ruler, others may come to their assistance against him.

Despite occasional injustice, it is wrong to stir up and wage civil war against a *rightful* ruler, that is, one who retains his right to rule. The right referred to here is not so much legal right as moral right. He may observe all legal and technical formalities and yet be a tyrant. Moral right means that he has not acted in such a way as to forfeit the office that still belongs to him in justice. If he is the rightful ruler, no one may rightfully depose him.

How can a ruler lose his right to rule? There are two ways. First, abuse of power may destroy the title on which the right is held. If the ruler took office bound by certain conditions and breaks his side of the contract, the people are not bound to theirs; in feudal times subjects were released from their oath of allegiance, and modern republics have the machinery of impeachment. Second, no matter how absolute a ruler may be or how legitimate his title to office, he always loses his moral right to rule by certain, continued, and excessive tyranny. In this case rebellion against him becomes a justified revolution.

Revolution is a fundamental change in political organization or in a government or constitution: the overthrow or renunciation of one government or ruler and the substitution of another by the governed. Rebellion cannot be allowed unless it is the means for accomplishing a justified revolution. In a revolution a new kind of government may be established, or the same type may be retained with new personnel. The theory behind a justified revolution is that the ruler lost his right to rule by his tyrannical behavior, and that sovereignty reverts to the people in whom it always dwells basically anyway (according to the theory of Bellarmine and Suarez). Consequently, it is not directed against a rightful ruler, since he has lost his right, nor is it by private authority, but by the public authority of the whole people civilly united.

The following conditions for a justified revolution are set down not as absolute requirements, for historical contingencies are too diverse, but as useful norms:

1. The government has become habitually tyrannical and works for its own selfish aims to the harm of the people, with no prospect of a change for the better within a reasonable time.

The University of San Francisco  
Golden Gate & Parker Avenues  
San Francisco, California  
May 2, 1968

The Adjutant General  
Department of the Army  
Washington 25, D.C.

Subject: Application of Louis A. Negre, Private,  
US 56669214 for discharge as a conscientious  
objector

Dear Sir:

I have interviewed Private Louis A. Negre in connection with his application for discharge from the United States Army as a conscientious objector.

The interview took approximately one hour, and I inquired thoroughly into Private Negre's religious training and belief.

I found that Private Negre was born in France into a devout Catholic family, and received his elementary and high school education at Catholic institutions in Bakersfield, California.

Private Negre regularly attends Catholic church services and based upon my interview I would classify him as a devout and conscientious Catholic.

His sincerity seemed to me unquestionable.

Private Negre stated that his objection to military service in any form at this time was based upon the religious principles announced in the Pastoral Constitution on the Church in the Modern World adopted by Pope Paul VI and the Fathers of the Sacred Council of the Catholic Church in 1965, and study of the moral and legal issues which he had made after his entry into the armed services and during training for combat duty.

Private Negre stated that he had formed the conscientious opinion that he could not participate in any form in the present war, and was required by his religious training and belief to refuse to participate.



I counseled Private Negre that under the beliefs and teaching of the Catholic Church he is obliged to examine and form his own conscience in respect to participating or refusing to participate in the war at this time. This obligation is clear from the Scriptures, and has been explicated many times by the Fathers and Doctors of the Church, and recently both by Pope John XXIII and Pope Paul VI in section 16 of the Pastoral Constitution:

"In the depths of his conscience, man detects a law which he does not impose upon himself, but which holds him to obedience. Always summoning him to love good and avoid evil, the voice of conscience can when necessary speak to his heart more specifically: do this, shun that. For man has in his heart a law written by God. To obey it is the very dignity of man; according to it he will be judged."

Section 16 goes on to make particular reference to the doctrine of invincible ignorance:

"Conscience frequently errs from invincible ignorance without losing its dignity."

In our interview we further discussed the particular requirements of conscience for participation in war set out in sections 79 and 80 of the Pastoral Constitution, prohibiting terrorism, actions designed for the methodical extermination of an entire nation or ethnic minority, any act of war aimed indiscriminately at the destruction of entire cities or of extensive areas along with their population, inhuman treatment of the wounded or captured soldiers, the requirement of resort to every means of peaceful settlement before resort to war, and prohibition of wars seeking subjugation of other nations.

I counseled Private Negre that he was obliged to form his own conscience after giving all deference to the information and advice of the duly constituted government authorities and other persons, and that under Catholic doctrine he would be in religious duty bound to act in conformity to his conscience, even though it might err through invincible ignorance: In the words of the Pastoral Constitution that he was subject:

". . . to the permanent binding force of universal natural law and its all embracing principles. . . . There-



fore, actions which deliberately conflict with these same principles as well as orders commanding such actions, are criminal. Blind obedience cannot excuse those who yield to them."

Private Negre stated to me that after earnest and prayerful consideration after he had entered the Army, that it was clear to him that in conscience he could not in conformity to the Catholic training and belief participate in war in any form at this time.

I advised Private Negre that under the Pastoral Constitution, however, if for reasons of conscience he must refuse to bear arms, he had a duty to "accept some other form of service to the human community" as stated in Section 79.

Private Negre stated that he was prepared to perform such alternative service to the human community.

It is my conclusion based upon the interview and the foregoing that Private Negre is in sincere conscience opposed to participation in any form in the war at this time, and therefore is obliged by his religious training and belief to follow his conscience in this matter.

I am a duly ordained priest in the Catholic Church.

Sincerely yours,  
James E. Straukamp, S.J.

Bakersfield, Calif.  
June 23, 1968

TO WHOM IT MAY CONCERN:

I have known Louis A. Negre all his life. He is my nephew. He attended St. Francis Parochial School and Our Lady of Perpetual Help Parochial School, he also attended Garces Catholic High School.

He has always given complete satisfaction to his parents, he is a very considerate boy and very honest. He is a devout Catholic and practices his religion faithfully attending the services regularly.

I am sure that Louis is sincere, when he states that he is conscientiously opposed in participating in the war in Viet Nam.

Sincerely,

Alice Chanley  
37 Panorama Drive  
Bakersfield, Calif.

Telephone FA 7-3041

1001 South Union Ave.

**MAISON JAUSSAND**

French Restaurant  
Bakersfield, California

June 10, 1968

**TO WHOM IT MAY CONCERN:**

I have known Louis August Negre since the year 1961. He worked for us in our restaurant until he entered the United States Army. We found him to be reliable, courteous, punctual and an excellent worker.

I found him to be loyal, faithful and a devote Catholic. He practiced his religion and believed in his religion.

**Mrs. Martin F. Jaussand**

Bakersfield, California  
June 23, 1968

TO WHOM IT MAY CONCERN:

I have known Louis A. Negre all his life, he is my nephew. He was raised to be a good Catholic, and attended Catholic Schools, from Kindergarten to High School. Louis has always given complete satisfaction to his parents, being good worker, obedient, sincere, very reliable and above all very religious, he practices his religion very well, always attending Church Services and taking his communion regularly.

When he states that he is opposed to the war in Vietnam on the grounds of being a conscientious objector, I am very certain that Louis is sincere, for after talking to him, I can vouch that he believes very strong in his convictions.

Sincerely,

John E. Cottalorda  
2924 Linden Ave.  
Bakersfield, Calif.

Bakersfield, Calif.  
June 8, 1968

TO WHOM IT MAY CONCERN:

I have known Louis Negre since he is four years old. He attended St. Francis Parochial School and Our Lady of Perpetual Parochial School and also Garces High School.

He is a Devout Catholic and I am sure he is sincere in stating that he is conscientiously opposed to participating in this war.

Sincerely,

Mrs. Marcelle Johnson  
200 Florida St.

Mrs. and Mr. Auguste Negre  
501 Niles Street  
Bakersfield, California

Bakersfield 7/1/1968

TO WHOM IT MAY CONCERN:

Our son Louis Auguste Negre has always been a good and understanding individual.

We can't say that he was sheltered as he grew up for it was at home that he learned his basic principles of the family living.

He always attended mass regularly. We had him attend Catholic school ever since he started for we felt that the only way he could grow up to be a man with high ideals he must have religious beliefs behind him.

His decisions had being a conscientious objector was purely his decision alone. We really know that after talking to him and knowing he his sincere in his action. We are willing and able to back him up all the in his belief.

We feel this letter will be of some spiritual help in his decision to live as a conscientious objector.

Thank You,  
Sincerely,

Auguste Negre  
Martha P. Negre

## DEPARTMENT OF THE ARMY

Headquarters, Western Area  
Military Traffic Management and Terminal Service  
Oakland Army Base  
Oakland, California 94626

In reply refer to

25 January 1969

HTW PA CH

SUBJECT: Request for Conscientious Objector  
Classification

TO: Whom it may concern

1. Under provisions of AR 635-20, I have interviewed Pvt Louis Negre, US 56 669 214, concerning his desire to be classified as a Conscientious Objector.

2. He is basing this on his religious beliefs in that he feels war, especially this war is immoral and thus for him to participate would be in violation of his conscience. The Catholic Church to which he belongs has no definite dogma in this regard. It has held and taught that a man who is sincere in his belief not to fight or to take part in a war which is against his conscience should be given a choice to serving his country in some other way.

3. On the basis of one interview it is very hard to judge the sincerity of anyone. However I feel this man is sincere. After being denied this status the first time, he tried unsuccessfully to resubmit his application with additional evidence. He even went so far as to go through a General Court Martial. I feel on this basis the man is sincere in his intention and his beliefs should be honored.

Charles J Richard  
Chap LTC

## STATEMENT

DANIEL H. HARRIS, Captain, 02321854, Hospital Company, Fort Ord, California, deposes and says:

Private Louis Negre was attached to the Hospital Company from Receiving Company and worked in the Hospital Company Orderly Room. As the Commanding Officer of Hospital Company, Private Negre worked directly under my control for the month of June 1968 and most of July 1968. I observed him to be a hard and capable worker grasping many of the functions of the Orderly Room. He was an asset to the Orderly Room and I hated to lose him. Private Negre appeared sincere in his belief concerning his application for conscientious objector as opposed to others I have met who, in my judgment, were not.

The foregoing is true to the best of my knowledge and belief.

Daniel H. Harris  
Captain

Subscribed and sworn to before me at Fort Ord, California this 25th day of November 1968.

Kenneth C. Brown  
Lieutenant Colonel, IG  
Inspector General



Robert R. Land, being duly sworn, deposes and says:

I served for the period from 9 December 1966 to 28 December 1967 in the Republic of South Vietnam, including combat duty, first as a doorgunner with the 118th Assault Helicopter Company, and then as a member of Long Range Reconnaissance Patrol and Security Platoons of Headquarters Company of the First Brigade of the 101st Airborne Division.

I am Specialist E-4 (Acting Sergeant) assigned to Company C USAG, Presidio, San Francisco, California. About September 1, 1968 I was the acting training NCO of Company C. I informed Lt. Swanson, the Executive Officer of Special Processing Detachment at the Presidio, that I required a clerk.

Lt. Swanson inquired for a qualified man and assigned PFC Negre to be the clerk working under my supervision. On September 11, 1968 PFC Negre commenced working directly under my supervision until October 20, 1968 when I was assigned to be the Company career counselor. Specialist Burnett took over as training NCO. My office continued to be in the same area as the training room, and I had daily contact with PFC Negre, and opportunity to observe his work.

During the time of approximately three months, I have found the work of PFC Negre to be of the highest caliber, his efficiency and his devotion to duty also to be of the highest caliber. Once shown how to do something, PFC Negre needed no prompting thereafter. I would consider it an honor to have PFC Negre work under me or with me in any place at any time.

During the time I have known PFC Negre I have found him to be of the highest moral character and law abiding in every particular. I have discussed his religious beliefs with PFC Negre upon several occasions. Based upon my observation I believe him to be sincere and conscientious in his religious beliefs.

Robert R. Land

## Office of the Staff Judge Advocate

AMPCO-SJA

28 January 1969

SUBJECT: Conscientious Objector Application of Private  
(E-3) Louis Negre, US 56 669 214

TO: Chief Overseas Replacement Station  
ATTN: Personnel Actions  
US Army Personnel Center  
Oakland Army Base, California 94626

1. On 27 January 1969 at 1500 hours, a conference was held in the conference room pursuant to AR 635-20, para 4d, in which Private (E-3) Negre was given the opportunity to express himself verbally as to why he should be discharged as a conscientious objector. Those present at the conference were Father J. Sterankamp, ordained Priest of the Roman Catholic Church, Specialist Five (E-5) James Cox, Private Negre and his attorney, Mr. Richard Harrington, and myself.

2. The following comments are based on my observations from that conference:

a. Private (E-3) Negre was born in Nice, France. He arrived with his family in the United States in 1952. One of the reasons his family left France, he states, was due to the "atrocities" in Vietnam. At that time, France was involved in war with Indo-China (Viet Nam).

b. The applicant was educated in Catholic schools through the 12th grade. He also received two years of education at Bakersfield Junior College, Bakersfield, California. His religious training has been extensive and he is extremely devout. His sincerity is shown by his willingness to be incarcerated for his beliefs. The roots of his beliefs are religious. The real question in this case is what are those beliefs. It is not that the beliefs are not based on religious grounds.

c. The applicant believes, in line with the dictates of the Catholic Church, that his conscience must be his guide. This is true even if his conscience is erroneous as long as it is

a "certain conscience." As stated in *Right and Reason, Ethics in Theory and Practice*, by Austin Fagothey:

... conscience is a subjective guide to conduct, that invincible error and ignorance are unavoidable, that any wrong which occurs is not done voluntarily and hence is not chargeable to the agent . . . . . The person is free of moral responsibility by the invincible ignorance bound up in his error. (38 *Right and Reason*)

The Church recognizes that PFC Negre may be objectively in error, but since he subjectively believes his decision to be correct, he must at all costs follow that belief. According to the author, Austin Fagothey, "one must never do an act that is intrinsically wrong, no matter what the penalty." (id. at Civil Law 347). The appellant sincerely believes that the war in Viet Nam is wrong and that his failure to object to serving in Viet Nam is in violation of his religious beliefs.

d. Private First Class Negre makes constant reference in his written applications to the "Viet Nam" situation. He stated in his 15 July 1968 application, "I am obligated by my conscience, under my religious training and belief, to refuse participation in any form in the war in Viet Nam." He disagrees with the philosophy that the United States is trying to help the Vietnamese people. He states in the same application, "I personally cannot believe that by being in Viet Nam we are helping the people there as we say." He is overly concerned with the type of war, not war itself. He is sincerely opposed to violence but it seems that he can in good conscience accept some "types" of war. He states that he accepts the "teachings of his Holiness Pope Paul VI as announced in the Pastoral Constitution as binding upon my conscience . . . ." (p. 5 of 15 July 1968 application). Pope Paul is also concerned with the "type" of war. In his statement in the Pastoral Constitution on the Church in the Modern World (7 December 1968), Pope Paul stated:

"But it is one thing to undertake military action for the just defense of the people, and something else again to seek the subjugation of other nations . . . .

Any act of war aimed indiscriminately at the destruction of an entire city or of extensive areas along with their population is a crime against God and man himself . . . ."

The war that concerned the Pope was a war of aggression rather than one of defense. He felt that the destruction of cities was a crime against God if it would serve no purpose. The war effort must not be indiscriminate. Pope Paul did not pass on the morality of a defensive war or the indiscriminate bombing of military targets.

e. PFC Negre is of the belief that the Viet Nam war is immoral and indiscriminate. He adopts the conclusions of Pope Paul VI, but makes his own judgment as to what is indiscriminate and what is aggression. He stated to Captain Leon Quinn, M.D., on 29 February 1968, that he felt the war was "unjust" and that the "illicit way it is being carried out makes it impossible for him to remain attached to the Army." (paraphrased by Captain Quinn). His objection to the Vietnam war was also apparent in my interview. He stated that he would serve in the United States in a non-combatant status if the United States was attacked. He would not carry a weapon, but he would assist in some other capacity as long as his support was indirect. He also would stay in the United States as a serviceman as long as his job was not combat oriented, even during the Viet Nam crisis.

f. It cannot be doubted that PFC Negre is opposed to killing if he has to be directly involved in it. He worked efficiently and effectively as a clerk at Fort Ord even though he possibly freed another person for combat duty in Viet Nam. He is not opposed to wearing the military uniform. He merely cannot directly participate in active combat whether as a foot soldier or as a medic. This is to him contrary to his belief that Viet Nam is an immoral war, and in violation of his religious training. If one can say that the wearing of a military uniform and the performance of a state-side job is not "bona fide conscientious objection to participation in war, IN ANY FORM," then this in itself would be a basis for denial of his application. But this is questionable and the real basis for my recommending rejection of the application is that, in my opinion, the applicant is objecting to a particular war, para 3b4, AR 635-20. His family left France because of the Viet Nam war, his Church leader speaks out against a particular type of war, and he is willing to serve in the United States in a non-combatant status even if the United States proper is involved in a war. He also includes in his application the pamphlet "Viet Nam and

your conscience," which categories the different wars. Viet Nam is the "dirty war of attrition." (p. 12).

3. It is my opinion that PFC Negre is conscientiously opposed to the use of force if that force has to be asserted by him. He is not conscientiously opposed to all types of war. His application under AR 635-20 should be denied, but he should be granted 1-A-0 classification under the purview of AR 600-200, para 2-12. He is in this sense a "conscientious objector and (is) conscientiously opposed to participation in *combatant* training and service." AR600-200, para 2-12.

Ronald K. Van Wert  
CPT JAGC  
Assistant Staff Judge Advocate

Priority

DA

To: CO USAPERSCEN OARS Oakland Calif.

Info: CG Ft Ord Oakland Calif.

UNCLAS

FM ACPC-SS

Subj: Separation

Ref: Your CMT 2 AMPCO-CO Dtd 29 Jan 69 concerning Pvt Louis Negre US 56669319—Appl such by EW up AR 635-20 is disap. Applicant's objection to service based upon a personal moral code which causes him to object to the war in Vietnam specifically and which disqualified him for separation on the grounds of conscientious objection.

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

In the Matter of the Application of  
LOUIS A. NEGRE;

*Petitioner,*

—v.—

STANLEY R. LARSEN, Commanding General, Sixth United States Army; JOHN H. DONALDSON, JR.; Commanding Officer, Oakland Army Personnel Center; RUSSELL A. MEREDITH; Commanding Officer, Overseas Replacement Station, Oakland Army Personnel Center; Commanding Officer, Transient Company, Overseas Replacement Station, Oakland Army Personnel Center; STANLEY RESOR; Secretary of the Army,

Petition for Writ  
of *Habeas Corpus*

*Respondents.*

The petition of LOUIS A. NEGRE respectfully shows:

1. Jurisdiction arises under 28 U.S.C. §2241, et seq. for the District Court to pass upon this petition for writ of habeas corpus.
2. Petitioner LOUIS A. NEGRE was inducted into the U.S. Army on August 30, 1967 and assigned Serial No. 56669214. During his training in the U.S. Army and not before that time, petitioner became opposed to participation in war in any form by reason of his religious training and belief. By reason of said religious training and belief, petitioner is unable to participate in war in any form.
3. Petitioner is presently illegally retained in the United States Army under assignment to report from Fort Ord, California to the Overseas Replacement Station, U.S. Army Personnel Center, Oakland, California, upon the date of this petition, for shipment to the Republic of Vietnam to participate in war. Petitioner has left Fort Ord and is in transit to the Oakland Army Personnel Center.
4. Upon February 26, 1968, petitioner applied for dis-

charge as a conscientious objector at the U.S. Army Personnel Center, Oakland, California. Said application was rejected by the commanding officer, Transient Company, who ordered petitioner to proceed to Vietnam to participate in war. Petitioners refused said order on grounds of his religious training and belief. The Commanding Officer, Transient Company, preferred court-martial charges against petitioner for disobedience of orders. Subsequently said charges were dropped and the application of February 26, 1968 was forwarded to the Secretary of the Army.

5. The Secretary of the Army denied the initial application on the grounds that petitioner's religion did not sustain his position, and that his petition lacked evidence supporting the sincerity of petitioner. About July 15, 1968 petitioner filed an additional application for discharge as a conscientious objector outlining the religious doctrine upon which his belief was founded and supporting his sincerity with appropriate letters.

6. The Commanding Officer, U.S. Army Personnel Center, Oakland, California, returned the aforesaid application "Not favorably approved." The Commanding Officer, Transient Company then on August 9, 1968 again ordered petitioner to proceed to Vietnam to participate in war, and petitioner again refused based upon his religious training and belief.

7. General court martial charges were preferred against petitioner for disobedience of orders, and trial held before a general court martial at the U.S. Sixth Army, Presidio, California. Petitioner was acquitted by the aforesaid court martial on January 22, 1969.

8. On January 27, 1969 petitioner filed a further and additional application for a discharge as a conscientious objector, a true copy of which is annexed hereto as Exhibit A. The chaplain of petitioner's faith, Lt. Col. Charles J. Richard, recommended approval of petitioner's application by endorsement dated 25 January 1969 annexed hereto as Exhibit B. Said recommendation concludes:

"I feel on this basis the man is sincere in his intention and his beliefs should be honored."

9. Nevertheless, and contrary to the law and evidence, petitioner was informed by his military superiors on the



date of this petition that the Secretary of the Army had denied petitioner's application.

10. Petitioner's military superiors gave petitioner orders to report on this date to the Overseas Replacement Station, U.S. Army Personnel Center, Oakland, California for transshipment to the Republic of Vietnam, to participate in the war at that place. Petitioner advised said superiors that he could hardly report to Oakland at noon when he received the orders at 10:00 a.m. in Fort Ord. Petitioner's superiors stated that petitioner would report in time if he reported by 12:00 noon on February 15, 1969, but declined to give petitioner written orders to that effect.

11. Petitioner is deprived of his liberty in violation of the constitution and laws of the United States in the following respects:

a. He is detained in the Army and subjected to coercion to participate in war, contrary to the express command of section 6(j) of the Universal Military Training and Service Act of 1967:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief is conscientiously opposed to participation in war in any form."

b. He is detained in the Army and subjected to coercion to participate in war, contrary to Army Regulation 635-20.

c. Petitioner's detention and the coercion against him violate due process of law, equal protection of the law, and petitioner's free exercise of religion, under the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

12. The respondents and each of them have subjected petitioner to duress and coercion to proceed to Vietnam and participate in war in violation of petitioner's religious training and belief, and respondents and each of them threaten and will, unless restrained by this court, punish petitioner by charging him with violation of military law and trying him before a military court, in which evidence of petitioner's religious belief will not be accepted as a defense to the charges that will be brought against him.

Respondents and each of them have threatened to remove petitioner from this federal district to an Army base in the Republic of Vietnam. Petitioner has no adequate or speedy remedy except this petition for habeas corpus.

WHEREFORE, petitioner prays:

1. That a writ of habeas corpus, or in the alternative an order to show cause, issue directing the respondents and each of them to produce the body of LOUIS A. NEGRE before this court at the time as may be designated in the writ or in the order to show cause, and that respondents and each of them show cause, if they have any, why LOUIS A. NEGRE is detained by them and not liberated from such unlawful restraint.

2. That a restraining order issue restraining the respondents and each of them from removing LOUIS A. NEGRE or threatening, coercing, or ordering him to allow himself to be removed from this federal district pending the date of hearing on this petition.

3. That a restraining order issue restraining respondents and each of them from preferring charges, commencing, or prosecuting a court martial against LOUIS A. NEGRE pending the date of hearing on this petition.

4. That the Court order respondents to discharge LOUIS A. NEGRE with an honorable discharge from the United States Army; and

5. For such other relief as appears proper.

Dated: February 14, 1969.

Richard Harrington  
Attorney for Petitioner

#### VERIFICATION

Richard Harrington being duly sworn deposes and says:

I am attorney for petitioner and execute this verification on his behalf because his is in transit from Fort Ord, California to the Overseas Replacement Station, U.S. Army Personnel Center, Oakland, California. I have read the foregoing petition for habeas corpus and know its contents and the same are true of my own knowledge, except where stated on information and belief, and as to such statements I believe it to be true.

Dated: February 14, 1969.

Richard Harrington

Subscribed and sworn to before me  
this 14th day of February, 1969.

Lonell F. Chow  
Notary Public

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

LOUIS A. NEGRE,

*Petitioner,*

—v.—

STANLEY LARSEN, ET AL.,

*Respondents.*

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No. 50793

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ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS. The sole claim upon which petitioner seeks relief in the instant habeas corpus proceedings is his assertion that the denial of his application for discharge from the United States Army is unsupported by any basis in fact.

In his application for discharge petitioner asserted that he was conscientiously opposed to participation in war in any form by reason of his religious training and belief.

The decision of the Department of the Army, which is based upon the petitioner's application, the record in support thereof and the opinion (recommendation) of the hearing officer, reads as follows:

"APPL SUBM BY EM UP AR 635-20 IS DISAP. APPLICANT'S OBJECTION TO SERVICE BASED UPON A PERSONAL MORAL CODE WHICH CAUSES HIM TO OBJECT TO THE WAR IN VIETNAM SPECIFICALLY AND WHICH DISQUALIFIES HIM FOR SEPARATION ON THE GROUNDS OF CONSCIENTIOUS OBJECTION."

(Exhibit I)

The opinion of the hearing officer concludes:

"It is my opinion that PFC Negre is conscientiously opposed to the use of force if that force has to be as-

serted by him. He is not conscientiously opposed to all types of war. His application under AR 635-20 should be denied, but he should be granted 1-A-O classification under the purview of AR 600-200, para 2-12. He is in this sense a 'conscientious objector and (is) conscientiously opposed to participation in *combatant* training and service.' AR 600-200, para 2-12."

(Exhibit II)

If the foregoing opinion has a basis in fact in support thereof, this court (regardless of the conclusion it would have reached were it permitted to substitute its judgment for that of the Army) must deny the petition, discharge the order to show cause and dismiss the proceedings.

While petitioner's frequent references to the war in Vietnam and his vigorous opposition thereto and condemnation thereof are compatible with a conscientious objection to all war by religious training and belief, and not necessarily the expression of "a personal moral code," nevertheless, it is a fact which, when considered together with other facts disclosed in the record, including the timing of the application and petitioner's request for non-combatant status with the restriction that he be assigned to duties in the United States, could sustain the opinion of the hearing officer and the decision of the Army. It therefore cannot be said that the decision of the Army is without a basis in fact in support thereof.

The petition for writ of habeas corpus is denied, the order to show cause is discharged and the proceedings are dismissed. The effect of this order is stayed ten (10) days from the date hereof to allow petitioner, should he choose to do so, to seek further relief from the Court of Appeals for the Ninth Circuit.

Dated: March 12, 1969.

Alfonso J. Zirpoli  
United States District Judge

[Heading Omitted]

NOTICE OF APPEAL

Notice is hereby given that petitioner LOUIS A. NEGRE hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order dismissing the petition for writ of habeas corpus entered March 13, 1969, and from the order denying rehearing and denying interlocutory relief entered March 27, 1969.

Dated: March 31, 1969.

Richard Harrington  
Attorney for Petitioner

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LOUIS A. NEGRE,

*Petitioner-Appellant,*

vs.

No. 24,067

STANLEY R. LARSEN, Commanding General  
Sixth United States Army, et al.,*Respondents-Appellees.*

[November 6, 1969]

Appeal from the United States District Court  
Northern District of CaliforniaBefore: CHAMBERS, KOELSCH, and KILKENNY,\*  
Circuit Judges.

## PER CURIAM:

Appellant challenges the validity of the District Court's order denying his petition for habeas corpus. He was inducted into the United States Army on August 30, 1967. On February 10, 1968, after receiving his basic training, he was ordered to Vietnam. On February 28th, while still in the United States, he started proceedings for separation as a conscientious objector. The proceedings culminated in a finding by Headquarters, Department of the Army, that he did not qualify, under applicable Army Regulations, as a conscientious objector. He has exhausted his administrative remedies.

Simply stated, the issue before us is whether there is a basis in fact for the finding and decision of the Department of the Army. The scope of review in a case such as this is one of "the narrowest known to the law". *Bishop v. United States* (9th Cir., June 19, 1969, No. 22759). An exhaustive analysis of the record requires us to conclude that there was

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\* Hon. John F. Kilkenny was a United States District Judge, sitting with this court by designation, at the time oral argument in this case was heard.

a basis in fact for the finding that appellant was not entitled to separation from the Army as a conscientious objector under Army Regulation No. 635-30(1)(3).<sup>1</sup>

Our analytical view of the record reveals that appellant has a personal moral code based on his sociological and philosophical views, rather than a conscientious objection to participation in war in any form by reason of religious training and belief. He objects to the war in Vietnam, not to all wars. It was not until he was faced with participation in the Vietnamese conflict that his beliefs concentrated sufficiently to express an objection. He does not express an objection to the nation's military activities in Korea, Japan, West Germany and other parts of the world. Nor, does he object to what he terms non-combatant duty in the Army in the United States. Clearly, his views are completely inconsistent with an objection to "war in any form." Although he would refuse to act as a medical corpsman in Vietnam, he would serve in essentially the same capacity in the United States. Beyond question, there was a basis in fact for the conclusion of the Department of the Army that appellant did not qualify, for separation, as a conscientious objector.

Based on *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969), appellant argues that a denial of conscientious objector classification to him on the ground that his beliefs

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<sup>1</sup>"1. *Purpose.* This regulation sets forth the policy, criteria, and procedures for disposition of military personnel who, by reason of religious training and belief, claim conscientious objection to participation in war in any form.

\* \* \* \* \*

3. *Policy.* a. Consideration will be given to requests for separation based on bona fide conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the active military service.

b. . . . Requests for discharge after entering military service will not be accepted when . . .

\* \* \* \* \*

(3) Based on essentially political, sociological, or philosophical views, or on a merely personal moral code.

(4) Based on objection to a particular war.

c. All requests for discharge based on conscientious objections will be considered on an individual basis in accordance with the facts and special circumstances in a particular case."

\* \* \* \* \*



are purely "personal," as opposed to "religious," denies to him equal protection of the law. We believe that *Sisson* was wrongly decided and decline to follow it.

WE AFFIRM.

# Supreme Court of the United States

No. 1669 Misc., October Term, 1969

LOUIS A. NEGRE,

*Petitioner,*

—v.—

STANLEY R. LARSEN, ET AL.

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1758, placed on the summary calendar, and set for oral argument immediately following No. 1170.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 29, 1970

IN THE  
**Supreme Court of the United States**  
October Term, 1970

FILE  
SEP 10 1970

CLERK

No. 325

PETITION NOT PRINTED

LOUIS A. NEGRE,

*Appellant,*

RESPONSE NOT PRINTED

*against*

STANLEY R. LARSEN, *et al.*,

*Appellees.*

On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* BY THE NATIONAL COUNCIL  
OF THE CHURCHES OF CHRIST IN THE U. S. A.  
JOINED IN BY EIGHT OF THOSE CHURCHES:

The American Baptist Convention,  
The Christian Church (Disciples of Christ),  
The Church of the Brethren,  
The Episcopal Church,  
The Lutheran Church in America,  
The Reformed Church in America,  
The United Church of Christ and  
The United Presbyterian Church in the U.S.A.

NATIONAL COUNCIL OF THE CHURCHES OF  
CHRIST IN THE U. S. A., *Amicus Curiae*  
By BREED, ABBOTT & MORGAN,  
*Its Attorneys*

1 Chase Manhattan Plaza  
New York, New York 10005  
944-4800

CHARLES H. TUTTLE  
THOMAS A. SHAW, JR.  
*Of Counsel*

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IN THE  
**Supreme Court of the United States**  
October Term, 1970

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**No. 325**

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LOUIS A. NEGRE,

*Appellant,*

*against*

STANLEY R. LARSEN, *et al.*,

*Appellees.*

---

**On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit**

---

**BRIEF AMICUS CURIAE BY THE NATIONAL COUNCIL  
OF THE CHURCHES OF CHRIST IN THE U. S. A.  
JOINED IN BY EIGHT OF THOSE CHURCHES:**

The American Baptist Convention,  
The Christian Church (Disciples of Christ),  
The Church of the Brethren,  
The Episcopal Church,  
The Lutheran Church in America,  
The Reformed Church in America,  
The United Church of Christ and  
The United Presbyterian Church in the U.S.A.

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The parties have consented in writing to the filing of  
this brief.



The Amici are all religious bodies, whose interest in this case arises from their concern for the free exercise of religion and the protection of the rights of conscience under the civil law of the United States.

### **The National Council of Churches**

The National Council of the Churches of Christ in the USA is a membership corporation incorporated in 1950 under the Membership Corporations Law of New York. It is the cooperative agency of thirty-three Protestant and Orthodox religious denominations with an aggregate membership of 42,500,000 throughout the United States. By its certificate of incorporation it is committed "to promote the application of the law of Christ in every relation of life."

The General Board of the National Council of Churches, which is its governing body, composed of delegates designated by the member denominations, adopted a policy statement on February 23, 1967, which includes the following pertinent passages:

"Although society has the power to press all its members into military duty, our nation has made room in its conscription laws for the operation of conscience by exempting certain classes of conscientious objectors from military service.

"The General Board of National Council of Churches considers this provision to be wise public policy, not only because intensely objecting men do not make the best soldiers, but because society should encourage men to live by conscience rather than compel them to violate it. The war-crimes trials at the conclusion of the Second World War asserted the ines-

capable responsibility which every human being bears for his own acts, even in obedience to military orders in time of war \* \* \*

“The highest interests of a free society are served by giving to conscience the greatest freedom consonant with justice, public order and safety \* \* \* Coercion of conscience can recruit no more than an unwilling body, while mind and spirit and a willing body are likely to serve society more fully in alternative tasks not repugnant to conscience. Therefore we urge the greatest possible respect for conscience and the greatest possible protection for its free exercise.

“In respect to the provisions for conscience in the selective service laws, we recommend the following:

(1) The retention of the provision of noncombatant military service for those conscientiously opposed to full military service, and the retention of the provision for alternative civilian service for those who are conscientiously opposed to participation in war in any form.

(2) The extension of precisely the same provisions for those who are conscientiously opposed to a particular war, declared or undeclared, that is, to the one which a young person confronts at the time of induction.”

It is in furtherance of the above directive that the National Council of Churches offers this brief in the instant case.

Although the National Council of Churches serves the interests of the several denominations which comprise it, they are autonomous religious bodies in their own right, and operate independently of the National Council of

Churches. Several of the member denominations of the National Council of Churches have policies similar to that of the National Council, and take this opportunity to speak jointly with the National Council of Churches as friends of the court in this case.

### **The American Baptist Convention**

The American Baptist Convention is a national religious body of more than 6,000 Baptist congregations comprising approximately 1,500,000 adherents. In May, 1966, the American Baptist Convention adopted a resolution containing the following language:

“We call upon our nation to respect the conscience of those who believe with integrity that either a particular war or all wars are morally unjustifiable, and who, therefore, refuse to serve in our armed forces.”

### **The Christian Church (Disciples of Christ)**

The Christian Church (Disciples of Christ) is an international religious body having 7,964 churches in the United States, comprising 1,883,263 members.

In October, 1968, The Assembly approved a resolution “Concerning Rights and Responsibilities of Conscience Regarding Participation in War,” which includes the following:

“ \* \* \* acknowledging that different persons will interpret the facts of a historical situation as viewed under the criteria of the just war theory in different ways, so that one might believe a war is just and another might believe it is unjust; we urge that our

young men be sensitive to the promptings of God's spirit, to weigh their decisions as Christian men, and to accept responsibility to be either conscientious participants or conscientious objectors to the particular war in which their service is requested. \* \* \*

"\* \* \* we urge the United States government to provide legal status and recourse for the conscientious objector to a particular war as is provided for the conscientious objector to all wars in forms of alternative service to one's country."

### **The Church of the Brethren**

The Church of the Brethren is a national religious body of 1,054 churches, comprising a membership of 187,957. It is one of the historic "peace churches" whose members have traditionally been exempted from conscription because of their absolute pacifism.

Section 2 of the statement of the Church of the Brethren on War, as revised by the 1970 Annual Conference, declares:

"The official position of the Church of the Brethren is that all war is sin and that we seek the right of conscientious objection to all war. We seek no special privilege from our government. What we seek for ourselves we seek for all—the right of individual conscience. We affirm that this conscientious objection may include all wars, declared or undeclared; particular wars; and particular forms of warfare. We also affirm that conscientious objection may be based on grounds more inclusive than institutional religion."

### The Episcopal Church

The Episcopal Church is a national religious body of 7,137 churches, comprising 3,373,890 members.

On October 24, 1968, the House of Bishops, which, as "the Fathers in God of the Church speaks corporately to the church the mind of its Chief Pastors," adopted the following resolution pertaining to conscientious objection:

"WHEREAS, the Lambeth Conference by resolution held that 'it is the concern of the Church to uphold and extend the right of conscientious objection,' and the Lambeth Report on the Renewal of the Church in Faith recognized 'anew the vital contribution to the Christian Church made by many of those who in conscience cannot participate in any war or in particular conflicts;' and

WHEREAS, the General Convention of 1967, by resolution, called upon the Church 'to provide counsel \* \* \* to those members of our Church who have problems of conscience with regard to the prospect of the military draft \* \* \*,' and

WHEREAS, other national and international Christian bodies have affirmed the right of selective conscientious objection,

THEREFORE be it resolved that we Bishops recognize the right of man to object, on grounds of conscience, provided he has made every effort to know all of the relevant factors involved, to participation in a particular war, even though he may not embrace a position of pacifism in relation to all war, and urge our government to enshrine such a right in the laws pertaining to Selective Service."

### **The Lutheran Church in America**

The Lutheran Church in America embraces a constituency in both the United States and Canada. Its congregations number 5,852 with an inclusive membership of 3,149,234.

In June 1968, The Biennial Convention of the church declared:

"Lutheran teaching, while rejecting conscientious objection as ethically normative, requires that ethical decisions in political matters be made in the context of the competing claims of peace, justice, and freedom. Consequently, a man need not be opposed to participating in all forms of violent conflict in order to be considered a bona fide conscientious objector. \* \* \*

[The church] stands by and upholds those of its members who conscientiously object to military service as well as those who in conscience choose to serve in the military. This church further affirms that the individual who, for reasons of conscience, objects to participation in a particular war is acting in harmony with Lutheran teaching \* \* \*

[C]onscientious objectors to particular wars, as well as conscientious objectors to all wars, ought to be granted exemption from military duty and opportunity should be provided them for alternative service."

This position of the church is a direct outgrowth of the classical Christian tradition as reflected in the writings of St. Augustine, Martin Luther, and the Augsburg Confession [Article XVI]:

"Christians are obliged to be subject to civil authority and obey its commands and laws in all that

can be done without sin. But when commands of the civil authority cannot be obeyed without sin, we must obey God rather than man [Acts 5:29]."

### **The Reformed Church in America**

The Reformed Church in America is a national religious body of 939 churches, comprising 230,519 members.

This church passed the following resolution:

"Request the churches to extend love and concern to all men, including those who, for reason of conscience, are not opposed to all war, but who, accepting the legal penalties, will not serve in a specific war because of their beliefs."

### **The United Church of Christ**

The United Church of Christ is a national religious body of 6,866 churches, comprising 2,032,648 members.

The General Synod of the United Church of Christ in June 1967 adopted the following resolution:

"Be it Resolved that the General Synod of the United Church of Christ recognize the right of conscientious objection to participation in a particular war or in war waged under particular circumstances, as well as the right of conscientious objection to participation in war as such."

### **The United Presbyterian Church in the U.S.A.**

The United Presbyterian Church in the U.S.A. is a national religious body of 8,667 churches, comprising 3,172,760 members.

In 1969, the 181st General Assembly of the church adopted an extensive statement on the church's teaching regarding "War, Peace and Conscience", which included the following policy:

"God is the Lord of conscience, not only of a participant in war for moral reasons, or of the objector to all war on pacifist grounds, but also of those who conclude that a particular conflict is morally unconscionable and indefensible. \* \* \* the church has a responsibility to urge the state to respect the conscientiously held scruples of those who oppose a particular war."

The same General Assembly, seeking to implement this teaching, recommended that the churches request the U. S. Department of Defense

"to establish procedures for considering requests within the Armed Forces for reassignment to non-combatant duties or for discharge for conscientious objection to a particular war, when the objections grow either out of experience prior to entering military service, but which do not become fixed until after such entry, or from a development of conscience which has occurred since entering military service."



### Questions Presented

In a memorandum dated April 1969, and filed in this Court in opposition to Negre's petition for a writ of mandate, the Solicitor General said (pp. 5 and 6):

"Petitioner argues that his religious beliefs are sincere—a characterization we do not dispute. \* \* \* As we read all the opinions in this case, petitioner's religious sincerity was not at issue; rather, the Army—as well as the district court—found that petitioner's religious belief, despite his sincerity, was directed at the war in Vietnam, and that war alone."

The Solicitor General's concession is fully consistent with the following finding of the Army Hearing Officer (R. 37):

"The roots of [Negre's] beliefs are religious. The real question in this case is what are those beliefs. It is not that the beliefs are not based on religious grounds."

Hence no issue of fact is presented. The issues of law to which this brief is directed are:

(1) Was Louis A. Negre entitled to a discharge from the Army, or, in the alternative, transfer to a bona fide non-combatant assignment in the United States as a conscientious objector under Section 6(j) of the Universal Military Training and Service Act properly interpreted and applied to the facts of this case? Our answer is: Yes.

(2) If, however, the answer must be No, then was Negre nevertheless entitled to identical treatment by reason of constitutional rights? Our answer is: Yes.

## POINT ONE

Louis A. Negre was entitled to a discharge from the Army or, in the alternative, transfer to a bona fide non-combatant assignment in the United States as a conscientious objector under Section 6(j) of the Universal Military Training and Service Act. 50 U.S.C. App. 456(j).

### I

Section 6(j) reads:

“Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reasons of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term ‘religious training and belief’ does not include essentially political, sociological, or philosophical views, or a merely personal moral code.”

According to Negre’s application for discharge from the Army as a conscientious objector, he is a Roman Catholic by religious training and belief, and was educated through high school in Roman Catholic institutions of learning. In his own words (R. 10, 12, 13):

“I \* \* \* accept as part of my religious training and belief the Catholic teaching that I must examine and form my conscience upon the best information I can gather. \* \* \* Equally, I accept my religious training and belief that where my conscience is certain, I must obey the order of conscience. \* \* \*

“I am obligated by my conscience, under my religious training and belief, to refuse participation in any form in the war in Veitnam. \* \* \*

“My family came to America in search of peace, and in search of freedom of conscience. I believe that the American law and constitution do allow freedom of religion and of conscience.”

Negre could not, on the basis of his religious belief, claim exemption as a conscientious objector prior to his application for discharge from the Army. His Roman Catholic training compelled no such action until he had an opportunity to examine the factual situation pertaining to the war in Vietnam, to draw a conclusory opinion, on the basis of his training and conscience, as to the justness of that war, and until he was faced with the imminent prospect of direct, personal participation in that war alone. There was “no realistic opportunity” to challenge his classification before receiving orders to report for combat duty in Vietnam. *Cf. United States v. Sisson*, 297 F. Supp. 902, 906 (appeal dismissed 38 U.S.L.W. 4616).

Hence, a primary question to which this brief is directed is whether or not the Army was right in deciding that Negre did not qualify for discharge as a conscientious objector because he objected to the war in Vietnam specifically, and because he admitted to the Hearing Officer that he would consider service, in a non-combatant capacity, in the event of a hypothetical attack on the United States at a hypothetical future time.

No such hypothetical limitation on the right of exemption is expressed in Section 6(j); and no such hypothetical limitation can rationally be expected or exacted of any man.

## II

Section 6(j) must receive a practical and common sense interpretation.

It does not invoke the inexhaustible range of human imagination, circumstance or hypothesis. It requires interpretation and application in terms of the realities when the classification occurs.

The word "war" in the statute is associated with the individual's actual "religious training and belief" as applied to the actual conflict which confronts him, and not with the capabilities of his or some other person's imagination to conceive hypothetical conflicts.

Congress certainly did not intend to condition exemption solely upon the almost inconceivable instance of a man who could bring himself honestly to say that he would not join a war in the defense of his city if an enemy were at its gates seeking to sack it, or if an invading army were practicing extermination as it advanced.

In accordance with our nation's historical and constitutionally expressed exclusion of the free exercise of religion from any form of prohibition by the federal and state governments, Section 6(j) lays its foundation in "religious training and belief" and the consequent inviolability of individual conscience. That which the individual in the light of his religious training and belief interprets as God's will furnishes a fortress of conscience which government cannot assault or invade.

In *Holy Trinity Church v. United States*, 143 U.S. 457, the Supreme Court said (p. 465):

“But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation.”

In *Cantwell v. Connecticut*, 310 U. S. 296, the Supreme Court said (pp. 303-4):

“Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.”

In *Girouard v. United States*, 328 U.S. 61, the Supreme Court said (p. 68):

“The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State.”

In *Williams v. United States*, 216 F. 2d 350, the Hearing Officer had reported that the registrant's claim of conscientious objection was simply the Bible's teachings “against murder, theft and other sinful things”, “but they are entirely aside from any faith or belief in participation in carnal warfare”. The registrant was indicted, convicted and sentenced to a two-year term. The United States Court of Appeals, Fifth Circuit, reversed and acquitted, saying (p. 352):

“The registrant may have his own construction and meaning for the scriptures and is not bound by that of the hearing officer or of the courts. That goes to the essence of religious liberty. \* \* \* Congress in its wisdom considered it more essential to respect a man’s religious belief than to force him to serve in the armed forces. The draft boards and the Courts are bound to carry out that policy.”

In *Davis v. Beason*, 133 U.S. 333, the Supreme Court said (p. 342):

“With man’s relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.”

### III

In Section 6(j) the words “in any form” relate back to “participation”.

In *Sicurella v. United States*, 348 U.S. 385 (a Jehovah Witness case), the Supreme Court said (p. 390):

“The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war.”

In *Taffs v. United States*, 208 F. 2d 329, 331 (cert. den. 347 U.S. 928) a Jehovah’s Witness, was denied classification as a conscientious objector “since appellant approved of and apparently would participate in theocratic wars, he was not opposed to ‘participation in war in any form.’ ”

But the court held that Congress did not “concern itself with theocratic wars—that is, wars carried on by the immediate direction of God. The words, ‘in any form,’ obviously relate, not to ‘war’ but to ‘participation in’ war. War, generally speaking, has only one form, a clash of opposing forces. But a person’s participation therein may be in a variety of forms.”

This interpretation was repeated in like words in *United States v. Hartman*, 209 F. 2d 366, 371, and in *United States v. Close*, 215 F. 2d 439, 442.

Obviously, the Army predicated its decision in Negre’s case on the error of relating the words “in any form” to the word “war”, and thereby denied Negre’s application because his religious belief did not exclude participation in a hypothetical future war, such as a direct attack on the United States, at a hypothetical future time.

By this error the Army changed the statutory word “war” into the plural and made it coextensive with all armed conflicts, of any nature whatsoever, which theory or hypothesis could conceive at a hypothetical future time.

Since it is settled that “freedom of conscience” “cannot be restricted by law” (*Cantwell v. Connecticut*, 310 U.S. 296, 304), a reading of Section 6(j) which would restrict the protection of conscience only when excluding participation in all hypothetical wars at all hypothetical future times, would so restrict the immunity of conscience as to entail the difference between the assurance of life and the hazard of death.

There is nothing to show that Congress had an intent so alien to our nation's basic principles. Nor can any such arbitrary and oppressive intent be presumed. Statutory language may be stretched to avoid discrimination in the enjoyment of First Amendment liberties, but language neither will nor can be stretched to create limitation or discrimination therein.

In *United States v. Seeger*, 380 U.S. 163, 183, the Supreme Court commented upon "the difficulties inherent in placing too narrow a construction on the provisions of Section 6(j)". In his concurring opinion Mr. Justice Douglas followed through by saying (p. 188):

"If it is a *tour de force* so to hold, it is no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds. In a more extreme case than the present one we said that the words of a statute may be strained 'in the candid service of avoiding a serious constitutional doubt.' *United States v. Rumely*, 345 U.S. 41, 47."

"In the candid service of avoiding a serious constitutional doubt," the Supreme Court said in *United States v. Rumely*, 345 U.S. 41, 47:

"With a view to observing this principle of wisdom and duty, the Court very recently strained words more than they need be strained here. *United States v. C.I.O.*, 335 U.S. 106. The considerations which prevailed in that case should prevail in this."

See also:

*Crowell v. Benson*, 285 U.S. 22, 62;  
*Ullman v. United States*, 350 U.S. 422, 433;  
*Ashwander v. TVA*, 297 U.S. 288, 341.



## POINT TWO

**In its essence, terms and effect, the Army's action was a restriction upon Negre's basic right of the free exercise of his religion as guaranteed by the First Amendment; and was also a violation of the prohibition in the Fifth Amendment against the deprivation of life, liberty and property without due process of law, since it was discrimination in denial of the equal protection of the laws.**

### I

By holding that Negre's claim to the status of a conscientious objector, derived as it expressly was from Roman Catholic training and belief, could not be honored because it did not exclude participation in a hypothetical war at a hypothetical future time, the Army was adopting an impermissible discriminatory test, attainable only by an absolute pacifist, who without physical resistance would accept martyrdom for himself, his neighbors and his country. Under the Army's decision, all persons failing such a test would be subject to combat service.

*Ex vi termini* such an interpretation and application of Section 6(j) constitute a gross discrimination in the right to the free exercise of religion, in the right to the acceptance of the mandates of conscience, and in the right to equality in the matters of due process and the equal protection of the laws.

What is more, such an interpretation and application plunge the Army and other arms of Government into "inquiries foreclosed to Government" (*United States v. See-*

ger, 380 U.S. 163, 184). It is no part of the business of Government to examine the rationality of a man's conscience, or to define or place limitations for it, or to discriminate between one man's conscience and religious belief and another's, or to differentiate in legal consequences because of such discrimination. Least of all are the Armed Forces competent or legalized so to do.

In *United States v. Seeger*, 326 F.2d 846, the United States Court of Appeals for the Second Circuit unanimously said (p. 851):

"It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination."

The force of this language is emphasized by the fact that on appeal the Supreme Court avoided the constitutional dilemma by holding that in fact *Seeger's* objection fell within the exempting words permissibly expanded to avoid unconstitutional discriminations.

What has happened here is that the Army has done precisely what in the *Seeger* case the Court of Appeals held could not be done constitutionally, and what the Supreme Court, through liberal statutory interpretation, avoided confronting as a constitutional issue.

When a ruling which affects primary rights draws a distinction between classes, that distinction must be supported by a compelling Government interest. *Shapiro v.*

*Thompson*, 394 U.S. 618. The *Shapiro* case dealt with the right to receive state welfare grants; application of the rule established therein is patently no less appropriate to the more fundamental right of religious freedom in the instant case. Yet, as convincingly detailed in Judge Zirpoli's decision in *United States v. McFadden*, 309 F.Supp. 502 (appeal pending No. 422, October Term, 1970), neither manpower requirements, troop morale, administrative efficiency nor any other reason compel the Army to practice invidious discrimination against a man simply because his religious opposition may not extend to all conceivable wars other than the one by which he is directly confronted.

We respectfully submit, therefore, that Section 6(j) can and should have been interpreted to effectuate Negre's separation from the Army in view of the fact that he is conscientiously opposed to the particular war in which he was ordered directly to participate solely by reason of his "religious training and belief," which "does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

## II

If Section 6(j) cannot be so interpreted, then, we submit that the issue must be decided whether, quite apart from Section 6(j), the Free Exercise of Religious Clause affords constitutional exemption in the present case.

The Supreme Court has been steadfast and frequent in its insistence that Government must refrain from "aiding one religion", and that sectarian preferences are no part of the business of Government.

Participation in war is an inescapable subject matter for religion and for the human conscience which derives its content from religious training and belief. Of necessity, therefore, the Army, in basing eligibility for separation upon the extent to which Negre's conscience might or might not exclude participation in hypothetical wars at hypothetical future times, was invading a central area of religious belief; was entering upon forbidden inquiries in the field of conscience; and was favoring one religious position and its adherents and a particular conscience as against the religions and consciences of others.

### POINT THREE

If the Army were correct in holding that Section 6(j) and its wording mandated denial of Negre's application for discharge as a conscientious objector, the section would in respect of such denial be unconstitutional as violative of the First and Fifth Amendments.

It would be discriminatory against the religious belief and conscience which he has a constitutional right freely to entertain and exercise; and for which he is entitled to due process of law and the equal protection of the laws.

#### I

We are not concerned with speculation as to the possible meanings of the terms "religion," "religious training and belief," or "conscience."

The Roman Catholic faith is a "religion" by any standards. There is no issue as to the reality of Negre's Roman Catholic "religious training and belief." There is no issue as to the reality and sincerity of his faith and conscientious objection based solely on Roman Catholic religion and teaching as he understands and practices it.

Nor is it claimed, or could be claimed, that there is any legitimate, much less compelling, state interest for denying to a Roman Catholic an exemption extended to members of other religious denominations. In fact, the state's interests will be best served by not involving the state in the age-old tragedies and disruptions of governmental preferences and immunities as between religious bodies or groups. In matters of religion the State is obligated by our Constitution to be in letter and spirit "*neutral*."

Nor can there be any issue that participation in war's killing and maiming of human beings, and in war's inevitable infliction of starvation, disease and destruction of property and the essentials of civilization, is an inescapable concern and involvement of religion and of the individual conscience, which derives its content and dictate from religious training and belief. Indeed Section 6(j) is itself a clear recognition of that truism.

There can be no denial of the soundness, particularly in the field of religion, of the statements in *United States v. Seeger*, 326 F.2d 846, 851:

"We find it unnecessary to determine whether an exemption for some or all conscientious objectors is a constitutional necessity, or is merely dependent upon the will of Congress. \* \* \* For it now seems well-established that legislative power to deny a particular privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional conditions. See *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination."

In *Speiser v. Randall*, 357 U.S. 513, a California statute granted certain tax exemptions to honorably discharged veterans, but it stipulated that such tax exemptions should not be granted to those who refused to subscribe to oaths that they did not advocate the overthrow of the Federal or State Government by force. The Supreme Court held that a discriminatory denial of tax exemption for engaging in certain speech is a limitation on free speech, and that

the procedure for determination imposed by the California statute denied due process. Said the Court, quoting from its prior decision in *Bailey v. Alabama*, 219 U.S. 219, 239:

"It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions."

So, likewise, the constitutional prohibition against impairing the free exercise of religion cannot be transgressed indirectly by the creation of a statutory exemption or immunity in favor of one religious belief any more than it can be violated by the direct enactment of such favor by prohibiting or restricting the free exercise of another religious belief.

## II

There is, of course, an obvious difference between "*religious belief*" as a constitutional right and "*religious action*" as a constitutional right. Under the First Amendment the former is *absolute*; but the latter may be restricted or even prohibited to the extent that it constitutes a realistic danger to public safety or morals or the essential rights of others.

As said in *Abington School District v. Schempp*, 374 U.S. 203, 218, quoting from *Cantwell v. Connecticut*, 310 U.S. 296:

"Thus the (First) Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

This constitutional difference between the absolute freedom of religious belief and the qualified freedom of religious action entails in its application a constitutional difference between a *state prohibition* of a religious practice and a *state command* to do an act contrary to a religious belief and the conscience which such belief activates.

In the present instance this difference is not one of words but of primary substance. Here the Government, in substance, is not prohibiting an affirmative act. Rather, by denying Negre's application and ordering his service in Vietnam, it has commanded an affirmative act,—an act which involved his personal participation in the killing and maiming of other human beings in a struggle which his conscience, as activated by his religious belief, could not accept as just.

If the Government can *command* such a complete contradiction of the individual's religious belief and conscience, the First Amendment's guarantee of freedom to exercise religious belief ceases to be "absolute" and its wording ceases to mean what it says.

We know of no exception to the consistent holdings of the courts that Government cannot command disobedience of religious belief and conscience, and this even though such belief may seem to others to be irrational or even abhorrent.

In *Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court overruled its previous decision in *Minersville School District v. Gobitis*, 310 U.S. 586, and held (Judges Roberts and Reed dissenting) that a Virginia statute man-



dating the officers of the public schools to require all pupils under penalty of "insubordination" to salute the flag and pledge allegiance in the traditional attitude and words, violated the First and Fourteenth Amendments. The Court said, per Judge Jackson (pp. 641-2):

"As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. \* \* \*

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

In *Torcaso v. Watkins*, 367 U.S. 488 (1961), the Court held that a Maryland statute requiring a declaration of belief in the existence of God "as a qualification for any office of profit or trust in that State," was unconstitutional as violative of the First and Fourteenth Amendments. The opinion was written by Justice Black. Justices Frankfurter and Harlan concurred in result only. The Court reaffirmed the statement in the concurring opinion of Justice Frankfurter in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 213, 232, that (pp. 493-4):

"We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.' \* \* \* We renew our con-

viction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion'."

In *Sherbert v. Verner*, 374 U.S. 398, a South Carolina Unemployment Compensation Act made a claimant ineligible for benefits if he had failed without good cause to accept available suitable work when offered to him. Sherbert was discharged by her employer because she refused to work on Saturday. Her religious belief as a Seventh Day Adventist forbade her to do so. Because of this belief she was unable to obtain other employment. The State Commission denied her application for unemployment benefits. The Supreme Court held (Justices Harlan and White dissenting) that the denial was the equivalent of a state mandate to forego, under penalty of the loss of unemployment benefits, what her religious conscience mandated her not to do. The Court said (p. 402):

"The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell v. Connecticut*, 310 U.S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U.S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania*, 319 U.S. 105; *Follett v. McCormick*, 321 U.S. 573; cf. *Grosjean v. American Press Co.*, 297 U.S. 233."

To quote further (p. 404):

"Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from

the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."

In *In re Jenison*, 120 N.W.2d 515, judgment vacated 375 U.S. 14, Mrs. Jenison was summoned to serve as a juror and was selected to sit in a civil case. When the clerk was about to administer the oath, she refused because: "It's against my Bible teaching. My Bible tells me 'Judge not, so you will not be judged.' " The trial court thereupon sentenced her to jail for thirty days for contempt. The Supreme Court of Minnesota unanimously affirmed (120 N.W.2d 515). This Court vacated the judgment of contempt with the following memorandum (375 U.S. 14):

"The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Minnesota for further consideration in light of *Sherbert v. Verner*, 374 U.S. 398."

In *Sheldon v. Fannin*, 221 F.Supp. 766, students had been suspended from a public school for "insubordination" because of their refusal to stand for the singing of the National Anthem as required by a regulation of the Arizona State school authorities. The students were members of the Jehovah's Witnesses. They claimed that their religious faith mandated their refusal to stand, a faith based on the refusal of the three Hebrew children Shadrach, Meshach

and Abednego to bow down at the sound of musical instruments playing patriotic-religious music throughout the land as ordered by King Nebuchadnezzar of ancient Babylon.

The District Court held that the command by the state school authorities to stand, under penalty of suspension and expulsion, was an unconstitutional prohibition of the students' free exercise of religious belief, "no matter how unfounded or even ludicrous the professed belief may seem to others" (p. 775).

To quote (pp. 774, 775):

"In considering this contention, it should be observed that lack of violation of the 'establishment clause' does not *ipso facto* preclude violation of the 'free-exercise clause.' For the former looks to the majority's concept of the term religion, the latter the minority's. \* \* \* While implicitly demanding that all freedom of expression be exercised reasonably under the circumstances, the Constitution fortunately does not require that the beliefs or thoughts expressed be reasonable, or wise, or even sensible. The First Amendment thus guarantees to the plaintiffs the right to claim that their objection to standing is based upon religious belief, and the sincerity or reasonableness of this claim may not be examined by this or any other Court."

In *In re Estate of Brooks*, 32 Ill.2d 361 (205 N.E.2d 434) (1965), Mrs. Brooks, who, with her husband and adult children, were Jehovah Witnesses, and opposed, as a matter of religious belief, to blood transfusion, was dying in a hospital unless, in the opinion of the doctors, she received blood transfusion. The hospital and the doctors had been

told by her that she refused blood transfusion. Nevertheless, when she was approaching coma, the probate court appointed for Mrs. Brooks a conservator who thereupon consented in her name. The Supreme Court of Illinois held that the order was an unconstitutional state mandate violative of her free exercise of religious belief, saying (205 N.E.2d 435, 442):

“What has happened here involves a judicial attempt to decide what course of action is best for a particular individual, notwithstanding that individual’s contrary views based upon religious convictions. Such action cannot be constitutionally countenanced.”

In *Hardwick v. Board of School Trustees*, 205 P.Rep. 49, 56 (24 Cal.App. 696) (1921), the California District Court of Appeals, and the California Supreme Court (sitting *en banc*), both held unanimously that a school board could not constitutionally compel children to dance in couples (boys and girls) when the religious beliefs of their parents forbade such style of dancing. After the court had held that such belief, if held by a religious organization was constitutionally inviolate, the court went on to say (pp. 52-3):

“But the principles above stated are not alone applicable to religious organizations or to persons actively affiliated with such organizations. They apply as well to any person having religious convictions irrespective of whether he is a member of any church or other religious society. Manifestly, a person may have religious views or principles of his own, different, perhaps, on doctrinal matters, from those of any church organization or any other person. He may have a way, peculiar to himself, of worshipping the Supreme Being, and there is no logical ground for holding that in thus

worshipping his Maker, he is not equally entitled with every other person or church society to the protection of the constitutional guaranties to which we have above adverted."

### III

For like reasons, the Army's interpretation of Section 6(j) would be grossly discriminatory against the religious belief and conscience which Negre has a constitutional right freely to entertain and exercise, and for which he is entitled to due process and the equal protection of the laws.

Whatever right Government might have, when faced with dire national peril, to subject to military service all able-bodied men, irrespective of religious belief or conscience, such authority cannot discriminate in the common burden or deny the equal protection of the laws by exempting members of one religious faith and not others.

By any such discrimination Congress would deny to the unfavored religious group and its members due process, the equal protection of the laws and the free exercise of religious belief. In addition, Congress would thereby be effecting a government favored establishment of religion.

If the First Amendment protects citizens in their conscientious refusal to work on Saturday, to stand up for the singing of the National Anthem, to repeat the pledge of allegiance to the flag, to dance in co-educational couples, or to affirm their belief in God, how much more important it is that the First Amendment should protect them in their conscientious refusal to take human life.

This is not a so-called "selective objection to war." Negre's objection to any form of participation in the Vietnam conflict was not merely held "with the strength of more traditional religious convictions". His decision was in fact *dictated*, once his moral judgment as to the justness of the relevant war was made, by the doctrine of a "traditional" religion—his Roman Catholic faith.

Rather, therefore, the Army's interpretation of Section 6(j) was a *selective exemption* from the burden and hazard of military service and from the obligation which military service imposes to destroy other human beings. It is a contradiction and nullification of the victory for liberty of conscience, speech, due process and equality in protection by the law of the land which our Constitution has wrung from the strife of human history. Such an interpretation mocks the hopes and aspirations of the countless individuals, including Negre's own parents, who have come to this nation seeking the freedoms which our law provides. For, as noted in *United States v. McFadden*, 309 F.Supp. 502, 506:

"[A]lthough our history is not free from religious intolerance and persecution, it has always been the ideal of our forefathers to create a country where . . . '[t]he liberty enjoyed by the people of these States of worshipping Almighty God agreeably to their consciences, is not only among the choicest of their blessings, but also of their rights.'"

**Conclusion**

**The disposition by the courts below should be reversed, and the relief sought should be granted.**

Respectfully submitted,

NATIONAL COUNCIL OF THE CHURCHES OF  
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E. ROBERT SEAYER, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 325

---

LOUIS A. NEGRE

VS.

STANLEY R. LARSEN, ET AL.

---

On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

---

**Brief of the American Friends  
Service Committee—Amicus Curiae**

---

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## Brief of the American Friends Service Committee—Amicus Curiae

---

### CONSENT OF PARTIES

Petitioner has consented to the filing of this brief amicus curiae by the American Friends Service Committee. We also have been informed by the office of the Solicitor General that there is no opposition to our filing of this brief.

### INTEREST OF AMICUS

In 1917 a small group of Quakers formed a committee to provide alternate service for conscientious objectors to military service in World War I. From that committee came

the American Friends Service Committee (AFSC). Today, the AFSC engages in a wide variety of programs expressing the concerns of the greater community of the Religious Society of Friends. Peace education, opposing war and conscription and for international cooperation, long has been one of its main activities.

In October, 1968, delegates from Friends Yearly Meetings, the AFSC and other Quaker organizations met in Richmond, Indiana, and issued a declaration which summarized the burden which Friends feel under the present system of conscription:

"We call on Friends everywhere to recognize the oppressive burden of militarism and conscription. We acknowledge our complicity in these evils in ways sometimes silent and subtle, at times painfully apparent. We are under obligation as children of God and members of the Religious Society of Friends to break the yoke of that complicity.

"As Friends we have for many years been granted privileged status within the draft system. This has often blinded us to the evil of the draft itself, and the treatment of those not so privileged. We are grateful for all those who by resolutely resisting the draft have quickened our conscience. We are called into the community of all who suffer for their refusal to perform unconscionable acts.

"We reaffirm the 'Advices on Conscription and War' adopted at Richmond in 1948. We realize in 1968 that our testimony against conscription is strengthened by refusing to comply with the Selective Service law. We also recognize that the problem of paying war taxes has intensified; this compels us to find realistic ways to refuse to pay these taxes.

"We recognize the evil nature of all forms of conscription, and its inconsistency with the teachings and examples of Christ. Military conscription in the United

States today undergirds the aggressive foreign policies and oppressive domestic policies which rely on easy availability of military manpower. Conscription threatens the right and responsibility of every person to make decisions in matters of conscience. Friends opposing war should refuse any kind of military service; Friends opposing conscription should refuse to cooperate with the Selective Service System.

"We call for the abolition of the Selective Service System and commit ourselves to work with renewed dedication to abolish it. We shall oppose attempts to perpetuate or extend conscription, however constructive the alleged purpose, by such a system as National Service. We do not support efforts at draft reform; the issue is not equal treatment under compulsion, but freedom from compulsion.

"We recognize how difficult it is to work through these complex issues, and to bear the burden of decision and action. We hold in love and respect each member of our Society as he follows where conscience leads. We know there are spiritual resources available to those who would be faithful."

In addition, the Richmond declaration urged Friends to "set up procedures for called Meetings for Worship to share the affirmation of young men who engage in such acts of resistance as . . . disaffiliating from Selective Service or the Armed Forces."

Quakers or the Religious Society of Friends traditionally are identified as a "Peace Church". Thus, in 1651, George Fox declined to be commissioned in Cromwell's army, telling the Commonwealth Commissioners that "I lived in the virtue of that life and power that took away the occasion of all wars . . . I told them I was come into the covenant of peace which was before wars and strifes were." *London Yearly Meeting of the Society of Friends, Christian Faith*

*and Practice in the Experience of the Society of Friends*, 14:613 (1963 Ed.). In 1661, Friends declared to Charles II:

"We utterly deny all outward wars and strife and fightings with outward weapons, for any end or under any pretence whatsoever. And this is our testimony to the whole world. The spirit of Christ, by which we are guided, is not changeable, so as once to command us from a thing as evil and again to move unto it; and we do certainly know, and so testify to the world, that the spirit of Christ, which leads us into all Truth, will never move us to fight and war against any man with outward weapons, neither for the kingdom of Christ, nor for the kingdoms of this world." *London Yearly Meeting, Christian Faith and Practice* 14:614.

During three centuries, Friends have struggled with their loyalties to nation and to God. Some entered the armed forces even though Friends Yearly Meetings consistently have minuted their corporate opposition to war, violence and conscription. Nevertheless, of all problems facing Friends throughout their history, they have been most in agreement on the question of war and conscription. *Friends Coordinating Committee on Peace, The Peace Testimony of Friends in the Twentieth Century*, page 37.

The opposition to war of Friends reflects a concern for what violence does to the spirit of the person who uses violence as well as the conviction that human life is sacred because it is the creation of God. In 1950, Konrad Braun wrote:

"In the present situation persuasive methods and peaceful adjustment should be tried as sincerely and consistently as possible. What if they fail, as well they may, and aggression is imminent? A tragic moral dilemma seems to arise: shall we set violence against violence and defend the society to which we feel bound by duty and affection, the lives and the future of those



we love—or shall we reject violence and allow the aggressor to do his worst? This looks like the choice between two equally monstrous evils. But essentially they are not equal. According to all moral standards, and seen in the light both of love and justice, the bearing of evil is diametrically opposed to the inflicting of evil. 'It is better, if the will of God be so, that ye suffer for well doing than for evil doing' (1 Pet. 3. 17). By fighting for civilisation and precious lives we may not save but destroy them, and would most probably destroy all moral and spiritual standards of our world through the use of the weapons of mass-destruction. And on the other hand refusal to fight need not be surrender. Nevertheless, nothing can be harder than that choice.

"Those who proclaim non-violence as a political technique often suggest that, if carried through with utter self-denial and self-control, it may force the hand of an aggressor. We must be prepared for the possibility of it having no such positive effect, and of it leading to outward defeat. Whether successful or not it will bring suffering, martyrdom and death to many. And we must accept the way of the Cross not only for ourselves. If we believe in non-violence as the true way of peace and love, we must make it a principle not only of individual but of national and universal conduct. It would be too easy to take the position of people who are specially called for an absolute obedience to the law of love and to be content with remaining a small and ineffective group, while the majority of our fellow men defend themselves and, in fact, us too. Whilst respecting those who decide to fight, because they equally follow the voice of their conscience, we must endeavour to win them, or as many of them as possible, to the way of non-violence, whatever the consequences. Certainly we shall try to do so without any feeling of moral superiority. For not by proclaiming the way of love can we prove it to be right and

applicable, but only by following it to the bitter end—and we know how soon we may stumble when put to the test.” *London Yearly Meeting, Christian Faith and Practice* 14:611.

Thus, by example, Friends strive to encourage others to practice non-violence in their lives. The emphasis, however, remains with the individual: each person must rely ultimately on his own conscience in determining where to draw the line between the demands of conscience and the dictates of society.

William Penn, an early Quaker, came from a wealthy class. The fashion of his time required such men to wear a sword. Faced with the Quaker belief in non-violence, he was troubled both by the presence of his sword and by the prospect of appearing improperly dressed without it.

He asked George Fox, “What shall I do about my sword?”

George Fox’s answer, tradition has it, was: “Wear thy sword as long as thee can, William.”

Drawing on that story, a Friend in another century recalled:

“We had been talking for an hour and a half with a clergyman neighbour, and afterwards I sat by the fire and thought. He had maintained that war has not as yet been grown out of, and that God still uses it as a means of training His children. As I thought over this, old thoughts and memories awoke from sleep. I remembered the familiar words about William Penn’s sword—‘Wear it as long as thou canst’: and it seemed clear to me that if William Penn had given it up from self-interest or cowardice, or for any reason short of the ‘witness of God in his own Soul’, he would have been wrong. And then the thought extended itself from the life of one man to the life of mankind, and I remembered a sentence in the Epistle to Diognetus ‘What the soul is in the body, that Christians are in the world’.

Then I seemed to see that war cannot rightly come to an end from self-interest or cowardice or any worldly reason but only because men and women, by one and one, without waiting for the others, have become loyal to the spirit of Christ." *London Yearly Meeting, Christian Faith and Practice* 14:610.

In 1939, at the time of the British Military Training Bill, the London Yearly Meeting of Friends declared:

"We recognise that it is not in our power to define or determine another's attitude. We should not urge anyone to be either more or less uncompromising than his own conscience compels. The duty is laid upon us to help each man to make a right decision and then to help him to be faithful to it when made." *London Yearly Meeting, Christian Faith and Practice*, 14:626.

In summary, Friends historically have opposed all wars and historically have opposed conscription. In doing so, Quakers have asserted the primacy of duty to God over duty to nation. Nevertheless, in determining what responses to make to the demands of the state Friends have recognized that each man answers to his own conscience and have sought to help individuals to heed their inner voice.

#### **STATEMENT OF THE CASE**

Petitioner, a member of the United States Army who has been ordered to Vietnam, sought discharge as a conscientious objector. After a hearing, an army hearing officer acknowledged that petitioner's "religious training has been extensive" and that "he is extremely devout." The hearing officer's report stated further:

"The roots of his beliefs are religious. The real question in this case is what are those beliefs. It is not that the beliefs are not based on religious grounds." (App. 37).

Nevertheless, the hearing officer recommended that Negre's application for discharge as a conscientious objector be denied. In accordance with the teachings of the Catholic Church, Negre has expressed his conscientious objection with reference to the particular war in Vietnam, rather than to all wars (App. 38-40).

Following the hearing officer's report, the Department of Army denied Negre's application on the ground that his objection is "based upon a personal moral code which causes him to object to the war in Vietnam specifically and which disqualified him for separation on the grounds of conscientious objection." (App. 41)

The United States District Court denied Negre's petition for a writ of habeas corpus. The Court of Appeals for the Ninth Circuit affirmed, premising its decision on the fact that petitioner "objects to the war in Vietnam, not to all wars." (App. 51)

#### **SUMMARY OF ARGUMENT**

The First Amendment of the Constitution mandates that government must be neutral in religious matters. In providing for the exemption of conscientious objectors in 50 U.S.C. App. § 456(j), Congress has followed this mandate. No one religion, no particular religious creed or belief, is given a preferred status. A person who, according to the religious teaching of his church, frames his conscientious objection to war in terms of objection to the particular war for which he has been conscripted is not automatically deprived of this exemption. The fact that such a person is conscientiously opposed to a particular war does not provide a basis for concluding that he is not conscientiously opposed to all war. The fact that a conscientious objector can conceive of hypothetical wars to which he might not

object, as opposed to the actual war to which he does object, is of no significance in determining whether his beliefs are religiously formed or are a merely personal moral code.

### ARGUMENT

In the statement concerning the interest of the amicus, we have set forth certain characteristics of the peace testimony of Quakers. The National Conference of Catholic Bishops has summarized the religious duty of Catholics to obey conscience in its 1968 pastoral letter, *Human Life in Our Day*:

"Nor can it be said that such conscientious objection to war, as war is waged in our times, is entirely the result of subjective considerations and without reference to the message of the gospel and the teaching of the church; quite the contrary, frequently conscientious dissent reflects the influence of the principles which inform modern papal teaching, the Pastoral Constitution and a classical tradition of moral doctrine in the church, including, in fact, the norms for the moral evaluation of a theoretically just war.

We submit that Congress has made no distinction between the religious beliefs of Quakers and those of Catholics in exempting registrants from service for conscience sake. Indeed, to construe 50 U.S.C. Ap. § 456(j) to distinguish registrants on the basis of their religious beliefs would raise severe constitutional questions under the establishment and free exercise clauses of the First Amendment.

The Court consistently and in a variety of factual contexts, has declared that government must be neutral:

"... in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion

and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968).

See also *Everson v. Board of Education*, 330 U.S. 1, 18 (1947); *Fowler v. State of Rhode Island*, 345 U.S. 67 (1953); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

The constitutional wall between church and state even prevents civil courts from settling property disputes which turn upon the resolution of ecclesiastical questions. *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

The Court thus far has interpreted the exemption granted by 50 U.S.C. App. § 456(j) so as to avoid First Amendment problems. In *U. S. v. Seeger*, 380 U.S. 163, 175 (1964) the Court examined the "richness and variety" of spiritual life in the United States and concluded:

"This vast panoply of beliefs reveals the magnitude of the problem which faced the Congress when it set about providing an exemption from armed service. It also emphasizes the care that Congress realised was necessary in the fashioning of an exemption which would be in keeping with its long-established policy of not picking and choosing among religious beliefs."

*Welsh v. U. S.*, 90 S.Ct. 1792 (1970) similarly avoided constitutional issues by applying *Seeger* to grant the exemption even though the registrant there interpreted his beliefs as being decidedly "non-religious". See also *Welsh v. U. S.*, 90 S. Ct. 1798 (Harlan concurring).

This case presents the question, not whether Congress distinguished between "religious" and "non-religious" persons with conscientious scruples against war, but whether Congress singled out for exemption only those registrants

whose religious convictions lead them unequivocally to oppose all wars.

The Court previously faced the problem in the context of the willingness of Jehovah's Witnesses to fight in a "theocratic war" and to battle at Armageddon. In *Sicurella v. U. S.* 348 U.S. 385, 390-391 (1954), the Court succinctly stated: "The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war." (Emphasis in original) The Court went on to emphasize the unlikelihood that the petitioner would ever have to engage in "real shooting wars" i.e. "actual military conflict between nations of the earth in our time".

In the case at bar, the hearing officer recommended denial of petitioner's application for discharge because in the hearing officer's opinion, Negre "is objecting to a particular war." In his application, petitioner stated that although he had his own convictions about the war in Vietnam at the time of his induction,

"Nevertheless I agreed to myself that before making any decision or taking any type of stand on the issue, I would permit myself to see and understand the Army's explanation of its reasons for violence in Vietnam. For, without getting an insight on the subject, it would be unfair for me to say anything, without really knowing the answer."

It was after Negre completed his infantry training "that I knew that if I would permit myself to go to Vietnam, I would be violating my own concepts of natural law and would be going against all that I had been taught in my religious training." (App. 11-12)

The hearing officer's recommendation noted that Catholic leaders distinguish between types of war, labeling aggres-

sive war or any act of war which is indiscriminately destructive a crime against God. The hearing officer further noted that petitioner's family had left their original home in France because of the Vietnam war and that Negre believes the Vietnam war is the kind of war which Catholic teaching defines as immoral (App. 38-39). The Court of Appeals adopted the view that because petitioner framed his conscientious objection in terms of his response to the Vietnam war, his objection was not to all wars (App. 51).

The crucial fallacy in the reasoning of the hearing Officer and the Court below is that by framing his objection within the context of the Vietnam war, Negre implies that he is willing to participate in some other wars, wars which are as real as that described by the Court in *Sicurella*. Negre has never known any real war other than the war in Vietnam. He has never expressed a willingness to fight in any other war. After satisfying himself as best he could concerning the reasons for our armed violence in Vietnam, he became satisfied that "to permit myself to go to Vietnam . . . would be going against all that I have been taught in my religious training."

The analysis adopted by the Court below misconceives the nature of religious and ethical thought among young people today. As a working party of the AFSC expressed it:

"Theologians, churchmen, and draft counselors must realize that for many young people in the religious and intellectual atmosphere of the 1960's there are no absolutist value positions, either pacifist or just war. Modern thought and expression — and particularly that of youth — is often conditioned by an existentialist or situational ethics approach that says "I will act from where I am and will believe what is necessary in relation to that action." Young people have related to nonviolence as a tactic and accepted it as a valid principle only in the situation in which it is used. There



tends to be a new morality that is suspicious of dogmatic principles and the things frequently sugared over by those principles. This is not to say that such activists are *not* nonviolent and *not* pacifists; in reality they may be the more so for emphasizing actions rather than words. And in their modest tactical use of nonviolence they often plumb far more deeply into violence as it actually resides in the governmental and economic structures of societies than do many pacifists who place their main emphasis upon visible overt violence.

"Yet in interpreting the thinking of young people today it is customary to overlook the consistency in their refusals to generalize and in their insistences upon behavioral proofs. It is customary to change — and to get them to change — what they are really saying. A young man who says, "I won't fight in Vietnam" and is dubbed by churchmen and counselors as a 'selective objector,' tends to see himself in this light. The term implies he selects one war as objectionable, that although the won't fight in this war he may well fight in another. The burden of proof is thus placed on his side rather than on that of his elders and the government, which see him as, by definition, a man who will go to some wars but not necessarily to every war. But the *state* should bear the burden of proof that a man — against his nature, against a civilized standard of his community life — should be forced to participate in a war." Education Division of the American Friends Service Committee, *The Draft?* page 32. (Emphasis in original.)

The Court in *Seeger* was mindful of the "ever broadening understanding of the modern religious community." *U. S. v. Seeger*, 380 U.S. at 180-183. Just as the concept of God continues to change in that community, the concept of man's duty to God continues to change. The language of

the statutory exemption and the Congressional policy which it embodies is certainly elastic enough to cover a sincere, religious objector, despite the fact that the doctrinal formulation which informs his conscientious convictions requires him to judge the particular war for which he is being conscripted. The statute does not require conscientious objectors to take a loyalty oath to the effect that they cannot conceive of any war in which their religious beliefs would permit participation. The statute simply and broadly exempts those persons who "by reason of religious training and belief" are "conscientiously opposed to participation in war in any form."

As Mr. Justice White pointed out in his dissent in *Welsh v. U. S.*, 90 S. Ct 1811, 1812, the congressional judgment behind that exemption may have been a purely practical one, that religious objectors are of no practical use to the military, or it may have expressed a desire to steer clear of infringing on the rights of religionists under the free exercise clause of the First Amendment. Neither policy is served by conscripting religious objectors whose church doctrines require a moral judgment concerning a particular war. The fact that petitioner had said "no" to the war in Vietnam does not provide any basis for concluding that he would say "yes" to any other war.

### CONCLUSION

We have demonstrated that the exemption accorded to conscientious objectors covers those religious objectors who conscientiously cannot participate in the war for which they have been conscripted. The phrase, "war in any form", refers to real wars. The fact that a person's religious training requires him to examine a particular war, rather than all conceivable wars, does not operate to deprive a person

of the exemption. For that reason, petitioner should be ordered discharged from the army.

Respectfully submitted,

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**Brief of the Executive Board of the National  
Federation of Priests' Councils—Amicus Curiae**

---

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## Brief of the Executive Board of the National Federation of Priests' Councils—Amicus Curiae

---

### INTEREST OF THE AMICUS

The National Federation of Priests' Councils is an association founded in 1968 which represents 129 member councils in 120 dioceses of the Catholic Church in the United States. The member councils in turn represent approximately 33,000 duly ordained Catholic priests. The members of the Executive Board which governs the Federation are priests who are elected to office by the House of Delegates, a body consisting of the elected representatives from the



member councils. The Executive Board is mandated to carry out the will of the House of Delegates and to take whatever other actions it judges to be necessary for achieving the purposes of the Federation.

The House of Delegates adopted a policy statement at their Second Annual Convention, March 26, 1969, which included the following passage:

"Whereas, the National Hierarchy has recommended 'a modification of the Selective Service Act making it possible . . . for so-called selective conscientious objectors to refuse . . . to serve in wars which they consider unjust or in branches of service . . . which would subject them to the [denial of] deeply held moral convictions about indiscriminate killing.'

"Whereas, the National Hierarchy hopes that 'in the all-important issue of war and peace, all men will follow their consciences.'

"Be it resolved that:

(1) The member councils of the National Federation of Priests' Councils work to guarantee that competent counseling be made available in their dioceses to young men who in conscience cannot take part in a war they consider immoral.

(2) That we respect the consciences of those people who are compelled to take symbolic responsible steps to protest the United States involvement in any war which they consider in conscience to be unjust."

Priests by their vocation are called to counsel, train and guide the faithful in matters pertaining to faith, morals and the formation of conscience. Pope Paul VI and the Second Vatican Council gave the following instruction to priests in the *Decree on the Ministry and the Life of Priests*, paragraph 6:

"Therefore, as educators in the faith, priests must see to it, either by themselves or through others, that

the faithful are led individually in the Holy Spirit to a development of their own vocation as required by the gospel, to a sincere and active charity, and to that freedom with which Christ has made us free. Ceremonies however beautiful, or associations however flourishing, will be of little value if they are not directed toward educating men in the attainment of Christian maturity.

"To further this goal, priests should help men see what is required and what is God's will in the great and small events of life."

In counseling draft-aged youth, the priest is often caught in a painful dilemma when confronted with a situation in which the young Catholic feels that his direct or indirect participation in a particular war would be immoral. In guiding the young man to a personal decision on the matter, the priest is placed in the dubious position of having to counsel his subject to disregard the law in order to follow a belief which results from religious training, or to disregard that belief in order to follow the law.

While the individual may be judged by others objectively in error in his determination whether or not a particular war does or does not in fact meet the tests of his religion to permit participation, the individual nevertheless is in religious duty bound to follow his conscience.

The interest of priests in the present case is particularly sharp because they are in jeopardy of prosecution for counseling Catholic selective objectors to refuse military service, if the selective service laws are construed to disqualify Catholic selective objectors from exemption. For the Catholic religion unequivocally requires priests to counsel the faithful to follow conscience in respect of military service, whether or not civil law makes any provision for following conscience.

That such counseling creates a direct interest in priests may be seen from *Gara v. United States*, 178 F.2d 38 (2d Cir. 1949) affirmed by an equally divided court, 340 U.S. 857 (1950), and *Warren v. United States*, 177 F.2d 596 (10 Cir. 1949) cert. denied 338 U.S. 947.

Warren, a Unitarian and a physician, was convicted for counseling his stepson to refuse induction.

Gara, Dean of Men at Bluffton College, had himself refused to register in the First World War and considered it his religious duty to oppose all forms of cooperation with war. He was present when Rickert was arrested. Government witnesses testified, among other things, that appellant said to Rickert at that time, "Do not let them coerce you into changing your conscience. . . ." 178 F.2d at 39.

It is established that Catholic priests have a religious duty to all members of the faith to counsel them "Do not let them [the government or anyone else] coerce you into changing your conscience. . . ."

If it is a felony to so counsel, then each priests who teaches Catholic doctrine to follow conscience in respect of military service is guilty of a felony under Section 12 of the Military Selective Service Act of 1967, 50 U.S.C. App. § 462.

Mindful of the concerns of priests who are religious counselors and in furtherance of the above resolution of the House of Delegates, the Executive Board of the National Federation of Priests' Councils has obtained the consent of the parties in this case to offer this brief as a friend of the court.

**THE CATHOLIC PASTORAL TEACHING IN RESPECT  
OF OBEDIENCE TO CONSCIENCE AND PERFORM-  
ANCE OR REFUSAL TO PERFORM MILITARY SERVICE.**

The *Decree on the Pastoral Office of Bishops* in the Church called on "the bishops of a given territory or

nation [to] jointly exercise their pastoral office to promote the greater good which the Church offers mankind . . ." (Section 38).

Pursuant to this instruction the Bishops of the United States met in canonical body and issued a joint pastoral letter on November 15, 1968, entitled *Human Life in Our Day*.

"We call upon American Catholics to evaluate war with that "entirely new attitude" for which the council appealed and which may rightly be expected of all who, calling themselves Christians, proclaim their identity with the Prince of Peace. We share with all men of good will the conviction that a more humane society will not come "unless each person devotes himself with renewed determination to the cause of peace" (n. 77). We appeal to policy makers and statesmen to reflect soberly on the council teaching concerning peace and war, and vigorously to pursue the search for means by which at all times to limit and eventually to outlaw the destructiveness of war.

"We join wholeheartedly in the council's condemnation of wars fought without limitation. We recognize the right of legitimate self-defense and, in a world society still unorganized, the necessity for recourse to armed defense and to collective security action in the absence of a competent authority on the international level and once peaceful means have been exhausted. But we seek to limit warfare and to humanize it, where it remains a last resort, in the maximum degree possible.

Continuing, the conference recognized:

"Meanwhile we are gratefully conscious that 'those who are pledged to the service of their country as members of its armed forces should regard themselves as agents of security and freedom on behalf of their people. As long as they fulfill this role properly, they are making a genuine contribution to the establishment of peace' (Gaudium et Spes, 79)".

Recognizing that Catholics may indeed engage in military service, but only when they fulfill the role properly, the letter then goes on to spell out the conditions under which military service would not be proper for a Catholic, and under which a Catholic must, obedient to conscience and his religious training and belief, refuse to perform military service:

"Nor can it be said that such conscientious objection to war, as war is waged in our times, is entirely the result of subjective considerations and without reference to the message of the gospel and the teaching of the church; quite the contrary, frequently conscientious dissent reflects the influence of the principles which inform modern papal teaching, the Pastoral Constitution and a classical tradition of moral doctrine in the church, including, in fact, the norms for the moral evaluation of a theoretically just war.

. . .

"As witnesses to a spiritual tradition which accepts enlightened conscience, even when honestly mistaken, as the immediate arbiter of moral decisions, we can only feel reassured by this evidence of individual responsibility and the decline of uncritical conformism to patterns some of which included strong moral elements, to be sure, but also included political, social, cultural and the like controls not necessarily in conformity with the mind and heart of the church.

. . .

"If war is ever to be outlawed, and replaced by more humane and enlightened institutions to regulate conflicts among nations, institutions rooted in the notion of universal common good, it will be because the citizens of this and other nations have rejected the tenets of exaggerated nationalism and insisted on principles of nonviolent political and civic action in both the domestic and international spheres.

"We therefore join with the Council Fathers in praising

'those who renounce the use of violence in the vindication of their rights and who resort to methods of defense which are otherwise available to weaker parties, provided that this can be done without injury to the rights and duties of others or of the community itself' (n. 78).

"It is in this light that we seek to interpret and apply to our own situation the advice of the Vatican Council on the treatment of conscientious objectors. The council endorsed laws that

'make humane provision for the care of those who for reasons of conscience refuse to bear arms, provided, however, that they accept some other form of service to the human community' (n. 79).

"The present laws of this country, however, provide only for those whose reasons of conscience are grounded in a total rejection of the use of military force. This form of conscientious objection deserves the legal provision made for it, but we consider that the time has come to urge that similar consideration be given those whose reasons of conscience are more personal and specific.

"We therefore recommend a modification of the Selective Service Act making it possible, although not easy, for so-called selective conscientious objectors to refuse—without fear of imprisonment or loss of citizenship—to serve in wars which they consider unjust or in branches of service (e.g., the strategic nuclear forces) which would subject them to the performance of actions contrary to deeply held moral convictions about indiscriminate killing. Some other form of service to the human community should be required of those so exempted.

"Whether or not such modifications in our laws are in fact made, we continue to hope that, in the all-

important issue of war and peace, all men will follow their consciences. We can do no better than to recall, as did the Vatican Council, 'the permanent binding force of universal natural law and its all embracing principles,' to which 'man's conscience itself gives ever more emphatic voice.' "

Indeed the duty of the priests to teach obedience to conscience is as binding as the duty of the faithful to follow conscience.

"Then Peter and the other apostles answered and said, We ought to obey God rather than men." Acts 5, 29

Referring to that text, Pope John XXIII of happy memory taught:

"Since the right to command is required by the moral order and has its source in God, it follows that, if civil authorities pass laws or command anything opposed to the moral order and consequently contrary to the will of God, neither the laws made nor the authorizations granted can be binding on the consciences of the citizens, since God has more right to be obeyed than men." *Pacem in Terris*, paragraph 51, April 11, 1963.

We close this very summary view of the Catholic doctrine of conscience by noting that the Catholic is morally bound to follow conscience when it has been prayerfully and properly formed, even though the individual may be judged objectively in error.

"Where there is such ignorance that man is in no way to blame for the ignorance itself, he is wholly free from blame." (In II Sent., dist. 22, q.2, art.2).

The teaching of St. Thomas Aquinas in rational philosophy and theology is adopted as authoritative for the

Church in Canon 1366 par. 2 of the *Codex Juris Canonici*. St. Thomas teaches very clearly:

"If a person acts against his conscience, he sins."  
*Quodlib.* 3, 27; cf. *II Sent.* dist. 22, q. 2, art. 2; *Summa Theologica* (1-2, q. 19, art. 5).

We turn from a summary of the Catholic religious duty to obey conscience as it perceives the laws of God, in case of conflict with civil law, to examine the Constitution and civil law involved in the present case.

### STATEMENT OF THE CASE

Louis A. Negre, the appellant, was born and raised a Catholic. He submitted to induction into the Army under the Military Selective Service Act. After completing basic and advanced infantry combat training, Negre concluded that under his Catholic religious training and belief, he could not participate in any form in the war in Vietnam, and applied for discharge from the Army as a conscientious objector.

The application for discharge was denied upon the ground that the Catholic religious doctrine in which Negre believed prohibited participation not in all wars but only in certain wars, such as wars of aggression or wars fought without limitation.

Negre was thereupon ordered to service in Vietnam, and brought habeas corpus for discharge from the Army. The District Court for the Northern District of California denied Negre's petition for habeas corpus and the Court of Appeals for the Ninth Circuit affirmed. The Supreme Court granted certiorari.

### QUESTIONS PRESENTED

1. Did Congress in enacting Section 6(j) intend to discriminate against members of religions prohibiting par-



ticipation in some wars, but not in all conceivable wars, and in favor of total pacifists?

2. If Congress intended to limit exemption from military service to persons who subscribe to belief in religions which teach total pacifism, does such discrimination violate the Free Exercise Clause and the Establishment of Religion Clause of the First Amendment, and violate the Fifth Amendment's guarantee of due process and equal protection of law for members of all religions without discrimination based upon religious doctrine?

### ARGUMENT

1. **No intent may be imputed to Congress to discriminate against members of religions such as the Catholic religion upon the grounds of doctrine. Therefore, Section 6(j) should be construed to exempt Catholic selective conscientious objectors from military service, equally with members of traditional pacifist sects.**

Section 6(j) provides in pertinent part:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reasons of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

The legislative history of section 6(j) of the current Selective Service Act demonstrates that it stems from a paraphrase of the dissent of Chief Justice Hughes in *United States v. Macintosh* 283 U.S. 605 at 633 (1931):

"... in the form of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter

of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." (Emphasis added).

Section 6(j) of the Selective Service Act of 1948 provided:

"(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. *Religious* training and belief in this connection means an individual's *belief in a relation to a Supreme Being involving duties superior to those arising from any human relation*, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." (Emphasis added).

Senate Report 1268, 80th Cong.2d Sess. 1989, 2002 (1948) states:

"This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *United States v. Berman*, 156 F.2d 377, certiorari denied, 329 U.S. 795)."

*United States v. Berman*, 156 F.2d 377 at 381 quoted the identical passage from *United States v. Macintosh* which was adopted by Congress in the 1948 Act. Indeed, *Berman* emphasized the intent of Congress to exempt men refusing military service obedient to their understanding of religious command, as opposed to philosophical, social or political policy not expressing the command of God, a Supreme Being, or a power higher than the state.

It should next be noted that the opinion of Chief Justice Hughes in *United States v. Macintosh*, adopted by the Congressional paraphrase quoted, involved specifically a selective or just war conscientious objector:

"... he explained that he was not willing 'to promise beforehand' to take up arms, 'without knowing the cause for which my country may go to war' and that 'he would have to believe that the war was morally justified.' He declared that 'his first allegiance was to the will of God;' that he was ready to give to the United States 'all the allegiance he ever had given or ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God.'" 283 U.S. at 631.

The opinion of Chief Justice Hughes, adopted by paraphrase in the 1948 Selective Service Act, is worth quoting at length because he correctly outlines the uniform intention of Congress from the earliest days of the union to recognize religious training and belief, and to refrain from imposing any religious test as a condition of disability or benefit imposed by the government.

"It goes without saying that it was not the intention of the Congress in framing the oath to impose any religious test.

\* \* \*

But the long-established practice of excusing from military service those whose religious convictions oppose it confirms the view that the Congress in the terms of the oath did not intend to require a promise to give such service. The policy of granting exemptions in such cases has been followed from colonial times and is abundantly shown by the provisions of colonial and state statutes, of state constitutions, and of acts of Congress."

Continuing, Chief Justice Hughes emphasized the recognition uniformly extended by Congress to religious scruple

against bearing arms upon the grounds of higher duty in conscience to God:

"The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. . . . There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts. The Congress has sought to avoid such conflicts in this country by respecting our happy tradition. In no sphere of legislation has the intention to prevent such clashes been more conspicuous than in relation to the bearing of arms."

Finally, Chief Justice Hughes squarely addressed the question of selective conscientious objection, or objection only to bearing arms in wars found to be unjust under religious training and belief:

"Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If, while recognizing the power of Congress, the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen

from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification." 283 U.S. at 635.

The Supreme Court has repeatedly acknowledged the recognition of religious belief uniformly expressed under our Constitution:

*Girouard v. United States*, 328 U.S. 61 (1945) adopted Chief Justice Hughes' dissent in *Macintosh* as the correct view of the intent of Congress in the immigration law. The court declared:

"The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle." 328 U.S. at 68.

In *United States v. Seeger*, 380 U.S. 163 at 169-170 (1965) held:

"Chief Justice Hughes, in his opinion in *United States v. Macintosh*, 283 U.S. 605, 75 L.ed. 1302, 51 S.Ct. 570 (1931) enunciated the rationale behind the long recognition of conscientious objection to participation in war accorded by Congress in our various conscription laws when he declared that 'in the forum of conscience, duty to a moral power higher than the State has always been maintained.' At 633, 75 L.ed. at 1315 (dissenting opinion). In a similar vein Harlan Fiske Stone, later Chief Justice, drew from the Nation's past

when he declared that 'both morals and sound policy requires that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.' Stone, *The Conscientious Objector*, 21 Col. Univ. A 253, 269 (1919).

"Governmental recognition of the moral dilemma posed for persons of certain religious faiths by the call to arms came early in the history of this country. Various methods of ameliorating their difficulty were adopted by the Colonies, and were later perpetuated in state statutes and constitutions. Thus by the time of the Civil War there existed a state pattern of exempting conscientious objectors on religious grounds." 380 U.S. at 169-170.

Whatever may be the limits of Constitutional and Congressional recognition of non-religious conscientious objection, all justices of the Supreme Court found common ground in *Welsh v. United States*, U.S., 38 L.W. 4486 (1970), that Congress intended to exempt from military service men who objected based upon their religious training and belief.

Mr. Justice Harlan concurring in the result on constitutional grounds stated:

"The policy of exempting religious conscientious objectors is one of long-standing tradition in this country and accords recognition to what is, in a diverse and 'open' society, the important value of reconciling individuality of belief with practical exigencies whenever

possible. See *Girouard v. United States*, 328 U.S. 61 (1946). It dates back to colonial times and has been perpetuated in state and federal conscription statutes. See Mr. Justice Cardozo's separate opinion in *Hamilton v. Bd. of Regents, Supra*, 293 U.S., at 267; *United States v. Macintosh*, 42 F.2d 845, 847. That it has been phrased in religious terms reflects, I assume, the fact that ethics and morals, while the concern of secular philosophy, have traditionally been matters taught by organized religion and that for most individuals spiritual and ethical nourishment is derived from that source. It further reflects, I would suppose, the assumption that beliefs emanating from a religious source are probably held with great intensity." 38 L.W. at 4496.

Mr. Justice White in his dissent, joined by the Chief Justice and Mr. Justice Stewart noted:

"Congress may have granted the exemption because otherwise religious objectors would be forced into conduct which their religions forbid and because in the view of Congress to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect.

\* \* \*

"Legislative exemptions for those with religious convictions against war date from colonial days. As Chief Justice Hughes explained in his dissent in *United States v. Macintosh*, *supra*, at 633, the importance of giving immunity to those having conscientious scruples against bearing arms has consistently been emphasized in debates in Congress and such draft exemptions are 'indicative of the actual operation of the principles of the Constitution.' However this Court might construe the First Amendment, Congress has regularly steered clear of free exercise problems by granting exemptions to those who conscientiously oppose war on religious grounds. \* \* \* The power to raise armies must be



exercised consistently with the First Amendment which, among other things, forbids laws prohibiting the free exercise of religion. It is surely essential therefore — surely 'necessary and proper' — in enacting laws for the raising of armies to take account of the First Amendment and to avoid possible violations of the Free Exercise Clause." 38 L.W. at 4497.

Mr. Justice Blackmun, Circuit Justice in *United States v. Levy*, 419 F.2d 360 (8th Cir. 1969) joined in an opinion broadly construing "religious training and belief" under the Selective Service Act. In the case of *In re Weitzman*, F.2d, 38 L.W. 2549 (8th Cir. 1970) in asserting the Constitutionality of distinguishing between non-religious and religious conscientious objection Justice Blackmun emphasized:

"The religious training and belief connection with conscientious objection came into the statute not as an establishment of religion but as a legislative accommodation of religious freedom. In the primary Seeger opinion, Mr. Justice Clark outlined the efforts of colonial, state, and federal governments to ameliorate the plight of persons of various faiths when called to bear arms. 380 U.S. at 169-73. It is fair to say that in the light of history, § 377(a) is another example of what Mr. Chief Justice Hughes referred to as 'our happy tradition' of avoiding conflicts between belief and governmental necessity. *U.S. v. Macintosh*, 283 U.S. 605, 633-35 (1931).

Catholic conscientious objection rests precisely upon the ground emphasized by the Supreme Court, to wit, religious belief that conscience in representing God, has more right to be obeyed than any law contrary to conscience:

"Since the right to command is required by the moral order and has its source in God, it follows that, if civil authorities legislate for or allow anything that is contrary to that order and therefore contrary to the



will of God, neither the laws made nor the authorizations granted can be binding on the consciences of the citizens, since God has more right to be obeyed than men." (Pope John XXIII *Pacem in Terris*, page 142a, April 11, 1963).

In *Sicurella v. United States*, 348 U.S. at 385, 388 (1955) the defendant was denied classification as a conscientious objector on the recommendation of the Department of Justice.

The Supreme Court dismissed the Department of Justice construction of the Act with the severe comment:

"Granting that these articles picture the Jehovah's Witnesses as anti-pacifists extolling the ancient wars of the Israelites and ready to engage in a 'theocratic war' if Jehovah so commands them, and granting that the Jehovah's Witnesses will fight at Armageddon, we do not feel this is enough. The test is not whether the registrant is opposed to all war, but whether he is opposed on religious grounds, to *participation* in war. [Emphasis in original.] 348 U.S. at 390-391.

Catholics, like Jehovah's Witnesses, follow God's commands over those of man; and Catholics as set out in *Negre's* application explicitly characterize conscience as representing the voice of God. If participation in the war violates the Catholic's conscience, Catholic doctrine is clear that the individual Catholic has a duty to comply with his own conscience and refuse military service.

Appellant in this case is no more required to become a Jehovah's Witness to qualify for exemption from military service than he is required to become a Quaker: The First Amendment affords equal protection in the exercise of their religious belief when—in refusing military service which would violate conscience—the Catholic's conduct is the same as that of the Jehovah's Witness or the Quaker's.

Since the authoritative construction by the Supreme Court in *Sicurella* that the words "in any form" modify "participation" and not "war", Congress has amended Section 6 of the Selective Service Act in 1957, 1958, 1961, 1962, 1963, 1964 and 1967. Upon each reenactment of Section 6(j), Congress retained the same word order involved in *Sicurella*, thus, by implication, ratifying the construction of Section 6(j) in *Sicurella*.

For the reasons stated, the construction of Section 6(j) of the Selective Service Act proposed by the government to discriminate against Catholics upon account of the statement of the Catholic religious doctrine is unsound and should be rejected. On the contrary, Section 6(j) should be construed to afford Catholics refusing military service obedient to conscience discharge from military service. Congress has not meant to put Catholics like Louis Negre to the hard and heroic choice of a Franz Jagerstatter.

**2. The Constitution requires the Army to discharge Catholic conscientious objectors under the same circumstances as it discharges members of traditional pacifist sects, without discrimination against the Catholic objectors based upon the Catholic statement of religious doctrine in respect of war.**

Any law or regulation which seeks to impose disability or punishment upon an individual solely for his religious beliefs and not for his conduct is unconstitutional as a violation of the First and Fifth Amendments. The foregoing proposition is so well established by the history of the Constitution and the prior decisions of the Supreme Court as to seem almost self-evident today.

For example, *Zorach v. Clauson*, 343 U.S. 306 at 313-314 (1952) declared:

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom

to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary \* \* \* The government must be neutral when it comes to competition between sects. It may not thrust a sect on any person. \* \* \*

In *Walz v. Tax Commission*, 25 L.Ed.2d 697 (1970) the Supreme Court just reaffirmed the foregoing proposition.

The construction of Section 6(j) of the Military Selective Service Act of 1967 urged by the government in the present case, however, would constitute an unconstitutional discrimination against Catholic conscientious objectors solely for their doctrine.

Section 6(j) provides in pertinent part:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reasons of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

The sincere Catholic objector is "conscientiously opposed to participation in war in any form" in the war in which he is called upon to serve and to which he objects. The authoritative religious teaching of the Catholic Church set out previously in this brief makes it clear that the Catholic has a religious duty to refuse military service in certain cases; namely in any form in a war which he in conscience has concluded does not meet the tests fixed by his religion to permit participation in war. The Catholic religious teaching equally is that conscience, properly formed, is the means through which God's commands are perceived by the individual.

It follows that the Catholic conscientious objector to a particular war in refusing military service is submitting to the moral power of divine law as he perceives it in conscience under his religion, exactly as is the conscientious objector from a traditional pacifist sect who perceives divine law in his conscience, but applying the doctrines and teachings of his sect.

Thus, if the Catholic objector is to be denied a discharge from military service at the same time the member of the traditional pacifist sect is granted such a discharge, the difference in treatment can be based only upon a difference in the doctrines or teachings of the respective churches.

*Sherbert V. Verner*, 374 U.S. 398 at 402 (1963) emphasized:

"The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell v. Connecticut*, 310 U.S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U.S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania*, 319 U.S. 105; *Follett v. McCormick*, 321 U.S. 573; cf. *Grosjean v. American Press Co.*, 297 U.S. 233."

The court went on to hold it unconstitutional to compel the individual therein to choose between following the precepts of her religion and forfeiting a government benefit (unemployment compensation) on the one hand, or abandoning one of the precepts of her religion in order to become eligible for the government benefit, on the other hand. See 374 U.S. at 404.

The unconstitutionality is clearer in the present case than in *Sherbert v. Verner*. The government does not con-

tend herein that Negre, a Catholic, should alter his conduct to become eligible for discharge. Rather, the government asserts that Negre would be eligible for discharge if only he would disclaim his *belief* in the Catholic doctrine in respect of participation in war, and affirm his belief in other doctrines in respect of participation in war, such as doctrines of the traditional pacifist sects.

As the Second Circuit noted in *United States v. Seeger*, 326 F.2d 846 at 851 (2d Cir. 1964):

"It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination."

The Supreme Court in affirming the same decision emphasized:

"The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government. • • • Local boards and courts in this sense are not free to reject beliefs because they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." *United States v. Seeger*, 380 U.S. 163 at 184-185 (1965).

Following the foregoing principles, in *United States v. Bowen*, F.Supp. (N.D. Cal, 1969) Judge Stanley Weigel held that the government's interpretation of § 6(j) was in violation of the establishment of religion clause of the First Amendment and also constituted a denial of equal protection of the laws. Judge Weigel stated:

"In denying conscientious objector status to Bowen based upon his religion opposition to the Vietnam War but permitting it to one whose religious opposition is to all wars, the effect of Section 6(j) is to breach the neutrality between religion and religion required by the mandate of the First Amendment.

"Section 6(j) must also fall before the constitutional prohibition against denial of equal protection of the laws. As has been seen, the Section permits exemption to religious 'absolute' objectors but denies it to religious 'selective' objectors. In this, it denies equal protection and, therefore, due process under the doctrine of *Bolling v. Sharpe*, supra. [347 U.S. 497 (1954)]."

Similarly, Judge Zirpoli in *United States v. McFadden*, 309 F.Supp. 502 at 506 (N.D. Cal., 1970) (appeal pending, No. 422, October Term), struck down § 6(j) as unconstitutional:

"In the case before the court the statute forces [the Catholic] to choose between following the precepts of his religion and going to jail or abandoning those precepts in order to avoid jail. Indeed, the case of [the Catholic objector] is stronger than Sherbert's, for not only is he faced with jail, but if he abandons his conscience he will be put in the position of possibly violating the fundamental precept of his religious belief—the killing of another human being in the cause of an unjust war.

"Such a burden upon the exercise of one's religion can have no place in a society built by men and women of all religions and persuasions. And although our history is not free from religious intolerance and persecution, it has always been the ideal of our forefathers to create a country where, as George Washington said: '[t]he liberty enjoyed by the people of these States of worshipping Almighty God agreeably to their consciences, is not only among the choicest of their blessings, but also of their rights.'"

Under the foregoing authorities therefore, Section 6(j) of the Military Selective Service Act of 1967 as construed by the government herein is unconstitutional as in violation of the Free Exercise and Establishment Clauses of the First Amendment, and the Due Process Clause of the Fifth Amendment which embodies Equal Protection of Law to members of all religious sects and beliefs, without any discrimination against any upon grounds of religious belief.

### CONCLUSION

For the reasons stated, Section 6(j) and the corresponding Army Regulation should be declared unconstitutional if they discriminate against Catholics prohibited by conscience formed under Catholic religious training and belief from participating in military service.

In the alternative, Section 6(j) and the Army regulation should be construed to accord equal treatment to Catholic conscientious objectors as to members of traditional pacifist sects, and Negro should be discharged.

Dated: September 13, 1970.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

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No. 325

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LOUIS A. NEGRE,

v.

STANLEY R. LARSEN, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

---

**OPENING BRIEF FOR LOUIS A. NEGRE, *Petitioner***

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**OPENING BRIEF FOR LOUIS A. NEGRE, *Petitioner***

---

**STATEMENT OF THE CASE**

The following facts in Negre's application and found by the Army hearing officer are undisputed:

Louis A. Negre was born in Nice, France, in July 1947. Both of his parents were Roman Catholic and he was raised in that religion. (R.2)

The family immigrated to the United States in 1951 and resided in Bakersfield from that time to the present. (R.1)

Negre attended St. Francis Catholic School from grades 1-5, Our Lady of Perpetual Help School from grades 6-7 and Garces Roman Catholic High School from grades 8-12. (R.1)

He attended Bakersfield Junior College from 1965 to June 1967.

He was classified 1-A and submitted to induction on August 29, 1967. He received combat infantry training at Fort Lewis, Washington, and advanced infantry training at Fort Polk, Louisiana. He was thereupon ordered to report for duty in Vietnam as a combat infantryman. (R.11)

Negre applied for discharge as a conscientious objector on February 26, 1968. The application was denied, Negre was ordered to proceed for shipment to Vietnam, refused, was tried by general court-martial for disobedience of orders and was acquitted. (R. 4, 43)

Thereupon, Negre filed further application for discharge as a conscientious objector, subject of the present action, upon January 27, 1969. (R.1-36)

The application stated in part:

"It was there, upon completion of that training, that I knew that if I would permit myself to go to Vietnam I would be violating my own concepts of natural law and would be going against all that I had been taught in my religious training. To contribute to the war in Vietnam would be in contravention of my own conscience and my moral beliefs. For one must not [sic] forget the purpose for which we as men were put on earth. That purpose was to please God, or Creator, for at the end of the world one is unable to bring with him the material things which he has accumulated while on earth. It is on that day that judgment will be passed on every man on the manner he served God and followed his conscience, given by God." (R.11-12)

Negre set out at length the excerpts from the pastoral letter "Human Life in Our Day" issued by the National



Conference of Catholic Bishops on November 15, 1968, including the following:

“ ‘As witness to a spiritual tradition which accepts enlightened conscience even when honestly mistaken, as the immediate arbiter of moral decisions, we can only feel reassured by this evidence of individual responsibility and the decline of uncritical conformism.’ ”

“ ‘We therefore join with the Council Fathers in praising ‘those who renounce the use of violence in the vindication of their rights and who resort to methods of defense which are otherwise available to weaker parties, provided that this can be done without injury to the rights and duties of others or of the community itself.’ ”

“ ‘Whether or not such modifications in our laws are in fact made, we continue to hope that, in the all-important issues of war and peace, all men will continue to follow their consciences. We can do no better than to recall, as did the Vatican Council, “the permanent binding force or universal natural law and its all embracing principles, “to which “man’s conscience itself gives ever more emphatic voice.” ’ ”  
(R.5)

Negre also quoted in support of his application passages from Scripture, the Act of Contrition, Vatican II, Pope John XXIII, Pope Paul VI, Cardinal Ottaviani and the American bishops. (R. 5-10).

The passages set out in Negre’s application established his religious duty to refuse military service which he had been ordered to render because such service would violate his conscience formed in accordance with his Catholic religious training and belief.

Attached to his application was the recommendation of the Catholic chaplain, the Reverend (Lt. Col.) Charles J. Richard:

“I feel on this basis the man is sincere in his intention and his beliefs should be honored.” (R. 34)

Also attached to his application was a letter of another Catholic priest, the Reverend James E. Straukamp, S.J. Father Straukamp wrote:

"I counseled Private Negre that under the beliefs and teaching of the Catholic Church he is obliged to examine and form his own conscience in respect to participating or refusing to participate in the war at this time. This obligation is clear from the Scriptures, and has been explicated many times by the Fathers and Doctors of the Church, and recently both by Pope John XXIII and Pope Paul VI in section 16 of the Pastoral Constitution: [thereafter quoted by Father Straukamp].

\* \* \*

"It is my conclusion based upon the interview and the foregoing that Private Negre is in sincere conscience opposed to participation in any form in the war at this time, and therefore is obliged by his religious training and belief to follow his conscience in this matter." (R. 27-28)

A hearing was held before Ronald K. Van Wert, Captain, JAGC, an attorney, who reported and recommended as follows:

"b. The applicant was educated in Catholic schools through the 12th grade. He also received two years of education at Bakersfield Junior College, Bakersfield, California. His religious training has been extensive and he is extremely devout. His sincerity is shown by his willingness to be incarcerated for his beliefs. The roots of his beliefs are religious. The real question in this case is what are those beliefs. It is not that the beliefs are not based on religious grounds."

"c. The applicant believes, in line with the dictates of the Catholic Church, that his conscience must be his guide. This is true even if his conscience is erroneous as long as it is a 'certain conscience.' As stated in *Right and Reason, Ethics in Theory and Practice*, by Austin Fagothey.

'... conscience is a subjective guide to conduct, that invincible error and ignorance are unavoidable, that any wrong which occurs is not done voluntarily and hence is not chargeable to the agent ..... The person is free of moral responsibility by the invincible ignorance bound up in his error.' (38 Right and Reason)

The Church recognizes that PFC Negre may be objectively in error, but since he subjectively believes his decision to be correct, he must at all costs follow that belief. According to the author, Austin Fagothey, "one must never do an act that is intrinsically wrong, no matter what the penalty." (id. at Civil Law 347). The applicant sincerely believes that the war in Viet Nam is wrong and that his failure to object to serving in Viet Nam is in violation of his religious beliefs."

"d. Private First Class Negre makes constant reference in his written applications to the "Viet Nam" situation. He stated in his 15 July 1968 application, 'I am obligated by my conscience, under my religious training and belief, to refuse participation in any form in the war in Viet Nam.' He disagrees with the philosophy that the United States is trying to help the Vietnamese people. He states in the same application, 'I personally cannot believe that by being in Viet Nam we are helping the people there as we say.' He is overly concerned with the type of war, not war itself. He is sincerely opposed to violence but it seems that he can in good conscience accept some 'types' of war. He states that he accepts the 'teachings of his Holiness Pope Paul VI as announced in the Pastoral Constitution as binding upon my conscience . . . .' (p. 5 of 15 July 1968 application). Pope Paul is also concerned with the 'type' of war. In his statement in the Pastoral Constitution on the Church in the Modern World (7 December 1968), Pope Paul stated:

'But it is one thing to undertake military action for the just defense of the people, and something else again to seek the subjugation of other nations . . . .

Any act of war aimed indiscriminately at the destruction of an entire city or of extensive areas along with their population is a crime against God and man himself . . . .'

The war that concerned the Pope was a war of aggression rather than one of defense. He felt that the destruction of cities was a crime against God if it would serve no purpose. The war effort must not be indiscriminate. Pope Paul did not pass on the morality of a defensive war or the indiscriminate bombing of military targets."

\* \* \*

"f. It cannot be doubted that PFC Negre is opposed to killing if he has to be directly involved in it. \* \* \* the real basis for my recommending rejection of the application is that, in my opinion, the applicant is objecting to a particular war, para 3b4, AR 635-20. \* \* \*"

"3. It is my opinion that PFC Negre is conscientiously opposed to the use of force if that force has to be asserted by him. He is not conscientiously opposed to all types of war." (R. 37-40)

The Department of the Army disapproved Negre's application for discharge:

"\* \* \* Applicant's objection to service based upon a personal moral code which causes him to object to the war in Vietnam specifically and which disqualified him for separation on the grounds of conscientious objection." (R. 41)

Negre was again ordered to service in Vietnam and filed his petition for habeas corpus on February 14, 1969. (R. 42-46)

The court below denied the petition on the ground that recommendation of the hearing officer and decision of the Department of the Army on the ground that

"While petitioner's frequent references to the war in Vietnam and his vigorous opposition thereto and condemnation thereof are compatible with a conscientious objection to all war by religious training and belief, and not necessarily the expression of 'a personal moral code', nevertheless, it is a fact which, when considered together with other facts disclosed in the record, including the timing of the application and petitioner's request for non-combatant status with the restriction that he be assigned to duties in the United States, could sustain the opinion of the hearing officer and the decision of the Army. It therefore cannot be said that the decision of the Army is without a basis in fact in support thereof." (R. 48)

Negre appealed to the United States Court of Appeals for the Ninth Circuit which affirmed. (R. 50) The Supreme Court granted certiorari on June 29, 1970. (R. 53)

### JURISDICTION

Negre petitioned for a writ of habeas corpus in the district court below. Jurisdiction exists in the district court to issue writs of habeas corpus under 28 U.S.C §§ 2241, et seq. The courts of appeals of eight circuits have now affirmed habeas corpus as the remedy for discharge from the armed services of conscientious objectors. *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968); *Bates v. Commander, First Coast Guard Dist.*, 413 F.2d 475 (1st Cir. 1969); *Brown v. McNamara*, 387 F.2d 150 (3d Cir. 1967), cert. denied, 390 U.S. 1005 (1968); *United States ex rel Brooks v. Clifford*, 409 F.2d 700 (4th Cir. 1969); *Brown v. Resor*, 407 F.2d 281 (5th Cir. 1969); *Packard v. Rollins*, 422 F.2d 525 (8th Cir. 1970); *Sertic v. Laird*, 418 F.2d 915 (9th Cir. 1969); *United States v. O'Malley*, 420 F.2d 1344 (D. C. Cir. 1969). Indeed, habeas corpus has been the traditional remedy for assertion of conscientious objection and quite possibly may not be constitutionally suspended. See *Oesterich v. Selective Service Board No. 11*, 393 U.S. 233 at

239 (1968); also see *Witmer v. United States*, 348 U.S. 375 at 377 (1955).

The Tenth Circuit originally refused habeas corpus until supposed in-service remedies had been exhausted. *Noyd v. McNamara*, 378 F.2d 538 (10th Cir.) cert. denied 389 U.S. 1022 (1967).

However, in *Craycroft v. Ferrall*, \_\_\_\_ U.S. \_\_\_\_ 25 L.Ed.2d 351 (1970) and *Bratcher v. Laird*, 397 U.S. 246 25 L.Ed.2d 281 (1970) the Solicitor General conceded that administrative remedies within the armed services had been exhausted or were non-existent. The Supreme Court remanded those cases for further consideration in view of the Solicitor General's concession. The present case does not involve a military court-martial, and the Court of Military Appeals is therefore without jurisdiction. 10 U.S.C. § 867. 28 U.S.C. § 1651 gives courts jurisdiction to issue writs only in support of their jurisdiction. Thus, in the present case, Negre had no remedy with the Court of Military Appeals and properly sought relief from the District Court instead.

#### QUESTIONS PRESENTED AND SUMMARY OF ARGUMENT

1. The conduct of the Catholic refusing military service pursuant to conscience formed under his religious training and belief is identical with the conduct of a member of a traditional pacifist sect refusing such service. Does it violate freedom of religion and the rule against establishment of religion and deny due process and equal protection of law to compel service of the Catholic or subject him to punishment solely because the statement of Catholic religious doctrine on war differs from the statement of traditional pacifist theological teaching on war?

The Army hearing officer herein conceded that Catholic religious doctrine prohibited Negre from performing military service then and there if he believed such service to violate conscience. (R. 38)

But the government contends that the Catholic may be punished or excluded from exemption from military service accorded members of traditional pacifist sects because Catholic doctrine would allow the same individual to participate in another, hypothetical war, at another hypothetical time and place, provided that the Catholic—contrary to the fact in the actual case—did not find service in such hypothetical war to violate conscience.

Appellant in this brief contends that disability or punishment for religious doctrine is prohibited by freedom of religion and the rule against establishment of religion under the First Amendment, and by due process and equal protection of law under the Fifth Amendment to the Constitution.

2. In view of the uniform expression of intent by Congress to respect religious conscientious objection to bearing arms as a legitimate expression of the belief "We ought to obey God rather than men", will section 6(j) of the Selective Service Act bear the construction that obedience to God by Catholics in refusing military service pursuant to conscience is to be punished, whereas obedience to God by members of traditional pacifist sects is to be recognized, merely because the statement of Catholic doctrine seeks to distinguish between just and unjust wars, though the Catholic doctrine of duty to follow conscience is as clear as that of the traditional pacifist sects?

Petitioner in this brief contends that the government's construction of section 6(j) herein to discriminate against Catholics is contrary to the uniformly expressed intent of Congress to subordinate the state's demand for military service of its citizens to a respect for conscientious objection expressing obedience to the commands of God as understood by the individual under his religious training and belief.

## STATUTE INVOLVED

Section 6(j) of the Military Selective Service Act of 1967, 50 U.S.C. App. § 456(j) provides in pertinent part:

"(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological or philosophical views, or a merely personal moral code."

## ARGUMENT

1. IT VIOLATES FREEDOM OF RELIGION, THE RULE AGAINST ESTABLISHMENT OF RELIGION, DUE PROCESS AND EQUAL PROTECTION TO SUBJECT A CATHOLIC—PROHIBITED BY HIS RELIGION AND CONSCIENCE FROM MILITARY SERVICE—TO DISABILITY OR PUNISHMENT UNLESS HE ABANDONS ONE OF THE PRECEPTS OF HIS OWN RELIGION AND PROFESSES A BELIEF IN THE DOCTRINES OF A TRADITIONAL PEACE SECT

The denial of discharge to Negre in the present case violates the First and Fifth Amendments as interpreted in *United States v. Seeger*, 380 U.S. 163 (1965) and in *Sherbert v. Verner*, 374 U.S. 398 (1963). The Army hearing officer described Negre:

" \* \* \* His religious training has been extensive and he is extremely devout. His sincerity is shown by his willingness to be incarcerated for his beliefs. The roots of his beliefs are religious. The real question in this case is what are those beliefs. It is not that the beliefs are not based upon religious grounds." (R. 37)



Finding Negre's beliefs to be religious and sincerely held, the Army hearing officer next made a careful analysis of Catholic religious training and belief:

"c. The applicant believes, in line with the dictates of the Catholic Church, that his conscience must be his guide. This is true even if his conscience is erroneous as long as it is a 'certain conscience.'

\* \* \* The Church recognizes that PFC Negre may be objectively in error, but since he subjectively believes his decision to be correct, he must at all costs follow that belief." (R. 37-38)

After his careful summary of Catholic doctrine and finding that the Catholic doctrine of conscience prohibited Negre to perform military service which violated his conscience, the Army hearing officer next turned to an examination of the Catholic teaching in respect to war:

"\* \* \* [Negre] is sincerely opposed to violence but it seems that he can in good conscience accept some 'types' of war. He states that he accepts the 'teachings of his Holiness Pope Paul VI as announced in the Pastoral Constitution as binding upon my conscience . . . .' (p. 5 of 15 July 1968 application). Pope Paul is also concerned with the 'type' of war. In his statement in the Pastoral Constitution on the Church in the Modern World (7 December 1968), Pope Paul stated:

'But it is one thing to undertake military action for the just defense of the people, and something else again to seek the subjugation of other nations . . . .

Any act of war aimed indiscriminately at the destruction of an entire city or of extensive areas along with their population is a crime against God and man himself . . . .'

"The war that concerned the Pope was a war of aggression rather than one of defense. He felt that the destruction of cities was a crime against God if it would serve no purpose. The war effort must not be indiscriminate. Pope Paul did not pass on the

morality of a defensive war or the indiscriminate bombing of military targets." (R. 38-39)

The Army hearing officer correctly found that Negre's religious training and belief prohibited Negre from performing the military service in Vietnam that Negre had been ordered to perform.

Congress in Section 6(j) of the Military Selective Service Act of 1967 has exempted religious conscientious objectors from military service, and the Army in Regulation 635-20 has directed the release from military service of religious conscientious objectors. Accordingly, the Constitution as interpreted in *United States v. Seeger*, 380 U.S. 163 (1965) put an end to the governmental inquiry at the point of finding Negre to be a religious conscientious objector and prohibited the Army hearing officer, the Army, and the courts from subjecting Negre to a disability because of the particular phraseology or statement of doctrine by Negre's religion as contrasted to the statement or doctrine of other religions such as those of the traditional pacifist sects.

The Supreme Court pointed the way for the government to stay free of theological controversy by adopting an objective test in *United States v. Seeger*, 380 U.S. 163 (1965):

"We believe that under this construction, the test of belief 'in relation to a Supreme Being' is whether a given belief that is sincere and meaningful in the life of its possessor is parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in relation to a Supreme Being' and the other is not." 380 U.S. at 165-166.

Continuing, the court points out:

"While the applicant's words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?

"Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight.

\* \* \*

"The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government. \* \* \* Local boards and courts in this sense are not free to reject beliefs because they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." 380 U.S. 163 at 184-185.

Indeed, *Negre* falls squarely under the holding of *Sherbert v. Verner*, 374 U.S. 398 at 404 (1963):

"Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."

Mrs. *Sherbert*, a Seventh Day Adventist, was denied employment compensation because—pursuant to her religious view of the Sabbath—she refused to work on Saturday. The court held the denial of the benefit of unemployment compensation to Mrs. *Sherbert* by the state to be unconstitutional because there was no compelling state interest to justify the infringement upon her religious freedom.

Mrs. Sherbert could have become eligible for unemployment compensation merely by abandoning the Seventh Day Adventist view that the Sabbath fell on Saturday and adopting the orthodox Christian teaching that the Sabbath falls on Sunday. If she so changed her views, Mrs. Sherbert would be free to work on Saturday, to refuse to work on Sunday and to collect unemployment compensation if she could not find work if she refused Sunday work.

In the passage set out above the Supreme Court held that it was unconstitutional to compel the citizen to abandon one of the precepts of her religion on the one hand or to forego the governmental benefit of unemployment compensation on the other hand. The court declared:

"The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell v. Connecticut*, 310 U.S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U.S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania*, 319 U.S. 105; *Follett v. McCormick*, 321 U.S. 573; cf. *Grosjean v. American Press Co.*, 297 U.S. 233."

As noted by Judge Zirpoli in *United States v. McFadden* 309 F.Supp. 502 at 506 (N.D. Cal. 1970) (appeal pending, No. 422, Oct. Term 1970):

"In the case before the court the statute forces [the Catholic] to choose between following the precepts of his religion and going to jail or abandoning those precepts in order to avoid jail. Indeed, the case of [the Catholic objector] is stronger than Sherbert's, for not only is he faced with jail, but if he abandons his conscience he will be put in the position of possibly violating the fundamental precept of his religious belief—the killing of another human being in the cause of an unjust war.

“Such a burden upon the exercise of one’s religion can have no place in a society built by men and women of all religions and persuasions. And although our history is not free from religious intolerance and persecution, it has always been the ideal of our forefathers to create a country where, as George Washington said: ‘[t]he liberty enjoyed by the people of these States of worshipping Almighty God agreeably to their consciences, is not only among the choicest of their blessings, but also of their rights.’ ”

We may remark, in fact, that the discrimination against the Catholic conscientious objector is less justifiable than the discrimination in *Sherbert v. Verner*. At least Mrs. Sherbert was denied a governmental benefit for conduct—she refused to work on Saturdays and all others who could not obtain employment for refusal to work on Saturdays were likewise denied unemployment compensation.

By contrast, the *conduct* of the Catholic objector in refusing military service obedient to conscience under his religion is identical with the *conduct* of the member of a traditional pacifist sect refusing military service at the same place and date. The government admits that a member of a traditional pacifist sect would be entitled to discharge from military service upon a finding that his beliefs were sincerely held and religious so long as the individual subscribed to the statement of doctrine traditionally affirmed by members of such traditional pacifist sect.

Thus, the government in the present case seeks to deny Negre the benefit of discharge from military service not because of Negre’s conduct, but solely because Negre will not surrender his belief: Namely, his belief that the Catholic statement of theology in respect of war is correct. The Government demands that Negre to qualify for discharge adopt the belief that the statement of theology of some traditional pacifist sect in respect of war is correct. Correspondingly, the Government demands that Negre admit that Catholic teaching in respect of service in war is erroneous.

What the First and Fifth Amendments prohibit as a minimum is imposing punishment or disability upon an individual not by reason of his conduct but by reason of the statement of religious doctrine or belief to which he subscribes. In a leading case on establishment of religion the Supreme Court declared:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. \* \* \*" *Everson v. Board of Education*, 330 U.S. 1 at 15-16 (1947).

As Judge Weigel held in *United States v. Bowen*, \_\_\_\_ F. Supp. \_\_\_\_, 2 S.S.L.R. 3421 (N.D. Cal. 1969):

"The Supreme Court has recently declared the meaning of this central principle of separation of church and state as follows:

'Government in our democracy, state and national, must be *neutral in matters of religious theory, doctrine, and practice*. It may not be hostile to any religion or to the advocacy of no religion and *it may not aid, foster, or promote one religion or religious theory against another* or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion and between religion and nonreligion.' *Epperson v. Arkansas*, 393 U.S. 97, 103-4 (1968) (emphasis added).

"In denying conscientious objector status to Bowen based upon his religious opposition to the Vietnam War but permitting it to one whose religious opposition is to all wars, the effect of Section 6(j) is to

breach the neutrality between religion and religion required by the mandate of the First Amendment."

*Sherbert v. Verner*, 374 U.S. 398 at 402 (1963) noted and followed a number of Supreme Court decisions that the government was prohibited from regulating religious beliefs as such or penalizing or discriminating against individuals or groups because of the religious beliefs and doctrines held by them:

"The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell v. Connecticut*, 310 U.S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U.S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania*, 319 U.S. 105; *Follett v. McCormick*, 321 U.S. 573; cf. *Grosjean v. American Press Co.*, 297 U.S. 233."

Many of the founding fathers came from European states in which the government barred from office, subjected to other disability or punished men for the practice of or even the belief in a religion other than the state-established religion. Belief in the Catholic religion was at one time high treason under the laws of Great Britain.

Against this background, the Supreme Court declared in *Board of Education v. Barnette*, 319 U.S. 624 at 641-42 (1943):

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Thus, under our system of government, as long as the conduct of the Catholic conforms to the norm of conduct



prescribed by Congress for members of the traditional pacifist sects, there can be no compelling state interest in denying the Catholic discharge from military service or punishing the Catholic for refusing military service in circumstances when an individual affirming traditional pacifist theology and doctrine would be discharged from military service. To the foregoing cases that the Constitution prohibits punishment of individuals for doctrine, we may add simply by citation the following:

*Abington School District v. Schempp*, 374 U.S. 203 at 214-215 (1963);

*Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 at 119, 122 (1952);

cf. *Braunfeld v. Brown*, 366 U.S. 599 at 603-607 (1961).

For the reasons stated, section 6(j) of the Military Selective Service Act of 1967, Department of Defense Directive 1300.6, and Army Regulation 635-20 are unconstitutional and void to the extent that they disable Negro from discharge from military service or subject him to punishment because the doctrinal statements of his Catholic religion do not conform to the doctrinal statements of traditional peace sects.

As eloquently stated by Judge Zirpoli in striking down section 6(j) as unconstitutional in *United States v. McFadden*, 309 F.Supp. 502 at 506 (N.D. Cal. 1970) (appeal pending, No. 422, October Term):

"In the case before the court the statute forces [the Catholic] to choose between following the precepts of his religion and going to jail or abandoning those precepts in order to avoid jail. Indeed, the case of [the Catholic objector] is stronger than *Sherbert's*, for not only is he faced with jail, but if he abandons his conscience he will be put in the position of possibly violating the fundamental precept of his religious belief—the killing of another human being in the cause of an unjust war.



"Such a burden upon the exercise of one's religion can have no place in a society built by men and women of all religions and persuasions. And although our history is not free from religious intolerance and persecution, it has always been the ideal of our forefathers to create a country where, as George Washington said: '[t]he liberty enjoyed by the people of these States of worshipping Almighty God agreeably to their consciences, is not only among the choicest of their blessings, but also of their rights.' "

**2. THE DISCRIMINATION BASED UPON RELIGIOUS DOCTRINE WHICH THE GOVERNMENT SEEKS TO READ INTO SECTION 6(j) OF THE SELECTIVE SERVICE ACT IS CONTRARY TO THE PRIOR CONSTRUCTION OF THE STATUTE AS WELL AS CONTRARY TO THE LEGISLATIVE INTENT, UNIFORMLY EXPRESSED FROM THE EARLIEST TIMES IN THE UNITED STATES, TO RESPECT THE RELIGIOUS PROPOSITION "WE OUGHT TO OBEY GOD RATHER THAN MEN."**

The legislative history of section 6(j) of the current Selective Service Act demonstrates that it stems from a paraphrase of the dissent of Chief Justice Hughes in *United States v. Macintosh*, 283 U.S. 605 at 633 (1931):

"... in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." (Emphasis added).

Section 6(j) of the Selective Service Act of 1948 provided:

"(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious

training and belief, is conscientiously opposed to participation in war in any form. *Religious* training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." (Emphasis added).

Senate Report 1268, 80th Cong. 2d Sess. 1989, 2002 (1948) states:

"This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *United States v. Berman*, 156 F.2d 377, certiorari denied, 329 U.S. 795)."

*United States v. Berman*, 156 F.2d 377 at 381 (9th cir. 1946) quoted the identical passage from *United States v. Macintosh* which was adopted by Congress in the 1948 Act. Indeed, *Berman* emphasized the intent of Congress to exempt men refusing military service obedient to their understanding of religious command, as opposed to philosophical, social or political policy not expressing the command of God, a Supreme Being, or a power higher than the state.

It should next be noted that the opinion of Chief Justice Hughes in *United States v. Macintosh*, adopted by the Congressional paraphrase quoted, involved specifically a selective or just war conscientious objector:

"... he explained that he was not willing 'to promise beforehand' to take up arms, 'without knowing the cause for which my country may go to war' and that 'he would have to believe that the war was morally justified.' He declared that 'his first allegiance was to the will of God;' that he was ready to give to the United States 'all the allegiance

he ever had given or ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God.' " 283 U.S. at 631.

The opinion of Chief Justice Hughes, adopted by paraphrase in the 1948 Selective Service Act, is worth quoting at length because he correctly outlines the uniform intention of Congress from the earliest days of the union to recognize religious training and belief and to refrain from imposing any religious test as a condition of disability or benefit imposed by the government.

"It goes without saying that it was not the intention of the Congress in framing the oath to impose any religious test. When we consider the history of the struggle for religious liberty, the large number of citizens of our country from the very beginning, who have been unwilling to sacrifice their religious convictions, and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of God, I find it impossible to conclude that such persons are to be deemed disqualified for public office in this country because of the requirement of the oath which must be taken before they enter upon their duties.

\* \* \*

But the long-established practice of excusing from military service those whose religious convictions oppose it confirms the view that the Congress in the terms of the oath did not intend to require a promise to give such service. The policy of granting exemptions in such cases has been followed from colonial times and is abundantly shown by the provisions of colonial and state statutes, of state constitutions, and of acts of Congress. See citations in the opinion of the circuit court of appeals in the present case. 42 F.(2d) 845, 847, 848. The first constitution of New York, adopted in 1777, in providing for the state militia, while strongly emphasizing the duty of defense, added 'that all such of the inhabi-

tants of this state (being of the people called Quakers) as, from scruples of conscience may be averse to the bearing of arms, be therefrom excused by the legislature, and do pay to the state such sums of money, in lieu of their personal service, as the same may, in the judgment of the legislature, be worth.'

Art. 40. A large number of similar provisions are found in other States. The importance of giving immunity to those having conscientious scruples against bearing arms has been emphasized in debates in Congress repeatedly from the very beginning of our government, and religious scruples have been recognized in draft acts. *Annals of Congress* (Gales), 1st Congress, vol. 1, pp. 434, 436, 729, 731; vol. 2, pp. 1818-1827; Acts of February 24, 1864, 13 Stat. at L. 6, 9, chap. 13; January 21, 1903, 32 Stat. at L. 775, chap. 196; June 3, 1916, 39 Stat. at L. 166, 197, chap. 134; May 18, 1917, 40 Stat. at L. 76, 78, chap. 15." 283 U.S. at 631-633.

Continuing, Chief Justice Hughes emphasized the recognition uniformly extended by Congress to religious scruple against bearing arms upon the grounds of higher duty in conscience to God:

"As was stated by Mr. Justice Field, in *Davis v. Beason*, 133 U.S. 333, 342, 33 L.ed. 637, 639, 10 S.Ct. 299, 8 Am. Crim. Rep. 89: "The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.' One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. Professor Macintosh, when pressed by the inquiries put to him, stated what is axiomatic in religious doctrine. And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to

religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience. There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts. The Congress has sought to avoid such conflicts in this country by respecting our happy tradition. In no sphere of legislation has the intention to prevent such clashes been more conspicuous than in relation to the bearing of arms. It would require strong evidence that the Congress intended a reversal of its policy in prescribing the general terms of the naturalization oath. I find no such evidence." 283 U.S. at 634-635.

Finally, Chief Justice Hughes squarely addressed the question of selective conscientious objection, or objection only to bearing arms in wars found to be unjust under religious training and belief:

"Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If, while recognizing the power

of Congress, the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification." 283 U.S. at 635.

We note with interest that Solicitor General Cox in briefing *United States v. Seeger* declared at p. 35 (reproduced as p. 20A in *Welsh v. United States*, No. 76, Oct. Term 1969):

"The core of the exemption for conscientious objectors is the unwillingness of the Congress, speaking the true will of the American people, to punish as a criminal a man who refuses to perform military service in obedience to what he believes is the command of a God transmitted by divine revelation. The unwillingness of the American people to compel a man to disobey a divine command and yield to a human obligation imposed by government is older than the Nation."

The Solicitor General then devoted pages 41-72 of the *Seeger* brief (26A-57A of the *Welsh* appendix) to a careful history of the uniform and unbroken Congressional history of intent to respect refusal of military service when it is based upon obedience by the individual to the commands or laws of God as he understands them under his religion. This history set out, moreover, is largely taken from *Selective Service System Monograph No. 11, Conscientious Objection* (1950) which likewise recognizes the Congressional intent to permit men in respect of military service to follow the commands of conscience as duty to God, a duty higher than duty to the state.

In his second report as Director of Selective Service to the President, Lewis B. Hershey stated:

" . . . it is part of our great tradition of freedom to recognize the fact of conscientious objection, even though it seems contrary to the national interest at the moment and is, to most Americans, a tragic misinterpretation of contemporary events. We recognize at the basis of conscientious objection, the very simple statement of the New Testament: 'It is better to obey God rather than man.' It might be invincible ignorance or misunderstanding or emotion, but if the individual regards his acts as his answer to a call from God or as God's will, in accordance with his religious training and belief, then the Nation, in accordance with its tradition, feels bound to recognize it.

\* \* \*

"The officers who had charge of the Presidential appeals thus summarized their experience during the year:

The appeals of conscientious objectors have presented some of the most troublesome as well as the most interesting questions. Here divergent ideas broke sharply over that rock of contention presented by the congressional language 'religious training and belief'. Local boards and boards of appeal generally brought little sympathy to the consideration of these cases. The tendency was to insist that conscientious objections be based upon certain kinds of religious experience. Many board members held the view that such objection must arise from religious training and belief in those particular religious organizations which make objection to war a definite part of their creed. It was argued, for example, that a member of the Catholic church could not possibly have a basis for conscientious objections.

Hearing officers of the Department of Justice took a somewhat broader but still limited view in their early reports. They held generally that the conviction, while limited to no particular creed, must nevertheless rest upon an easily recognizable religious background with the definition of religion the usual somewhat formal concept.

After much consideration we adopted a more liberal view, based upon a conclusion that the definitions of religion and the variety of religious experience are so nearly infinite in number as to make futile any attempt to say whether this or that one met the law. The practical effect of this decision was to say that conscientious convictions held by a man reared in the environment of a religious civilization and exposed, if only subjectively, to its ethical concepts, have their their [sic] roots in the same soil from which spring religious convictions, and furnish evidence from which may be drawn the inference that he recognizes a Deity or a power above and beyond the human. This view has prevailed." Selective Service in Wartime, Second Report of the Director of Selective Service, 1941-42 256, 258 (April 3, 1943).

The Supreme Court has repeatedly acknowledged the recognition of religious belief uniformly expressed under our Constitution:

*Girouard v. United States*, 328 U.S. 61 (1946) adopted Chief Justice Hughes' dissent in *Macintosh* as the correct view of the intent of Congress in the immigration law. The court declared:

"The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle." 328 U.S. at 68.

*Zorach v. Clauson*, 343 U.S. 306 at 313-314 (1952) declared:

" "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom



to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. \* \* \* When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. \* \* \* The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction,"

Mr. Justice Goldberg, joined by Mr. Justice Harlan concurred in *Abington School District v. Schempp*, 374 U.S. 203 at 306 (1963):

"Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require it to do so. \* \* \* [T]he required and the permissible accommodations between state and church frame the relation as one free from hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other."

In *United States v. Seeger*, 380 U.S. 163 at 169-170 (1965) held:

"Chief Justice Hughes, in his opinion in *United States v. Macintosh*, 283 U.S. 605, 75 L.ed. 1302, 51 S.Ct. 570 (1931) enunciated the rationale behind the long recognition of conscientious objection to participation in war accorded by Congress in our various conscription laws when he declared that 'in

the forum of conscience, duty to a moral power higher than the State has always been maintained.' At 633, 75 L.ed. at 1315 (dissenting opinion). In a similar vein Harlan Fiske Stone, later Chief Justice, drew from the Nation's past when he declared that 'both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.' Stone, *The Conscientious Objector*, 21 Col. Univ. A 253, 269 (1919).

"Governmental recognition of the moral dilemma posed for persons of certain religious faiths by the call to arms came early in the history of this country. Various methods of ameliorating their difficulty were adopted by the Colonies, and were later perpetuated in state statutes and constitutions. Thus by the time of the Civil War there existed a state pattern of exempting conscientious objectors on religious grounds." 380 U.S. at 169-170

Whatever may be the limits of Constitutional and Congressional recognition of non-religious conscientious objection, all justices of the Supreme Court found common ground in *Welsh v. United States*, 398 U.S. 30, 38 L.W. 4486 (1970), that Congress intended to exempt from military service men who objected based upon their religious training and belief.

Mr. Justice Harlan concurring in the result on constitutional grounds stated.

"The policy of exempting religious conscientious objectors is one of long-standing tradition in this country and accords recognition to what is, in a diverse and 'open' society, the important value of reconciling individuality of belief with practical exigencies whenever possible. See *Girouard v. United States*, 328 U.S. 61 (1946). It dates back to colonial times and has been perpetuated in state and federal conscription statutes. See Mr. Justice Cardozo's separate opinion in *Hamilton v. Bd. of Regents, Supra*, 293 U.S., at 267; *United States v. Macintosh*, 42 F.2d 845, 847. That it has been phrased in religious terms reflects, I assume, the fact that ethics and morals, while the concern of secular philosophy, have traditionally been matters taught by organized religion and that for most individuals spiritual and ethical nourishment is derived from that source. It further reflects, I would suppose, the assumption that beliefs emanating from a religious source are probably held with great intensity." 38 L.W. at 4496.

Mr. Justice White in his dissent, joined by the Chief Justice and Mr. Justice Stewart noted:

"Congress may have granted the exemption because otherwise religious objectors would be forced into conduct which their religions forbid and because in the view of Congress to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect.

\* \* \*

"Legislative exemptions for those with religious convictions against war date from colonial days. As Chief Justice Hughes explained in his dissent in *United States v. Macintosh*, *supra*, at 633, the importance of giving immunity to those having conscientious scruples against bearing arms has consistently been emphasized in debates in Congress and such draft exemptions are 'indicative of the actual operation of the principles of the Constitution.' However, this Court might construe the First Amendment, Congress has regularly steered clear of

free exercise problems by granting exemptions to those who conscientiously oppose war on religious grounds.

"If there were no statutory exemption for religious objectors to war and failure to provide it was held by this Court to impair the free exercise of religion contrary to the First Amendment, an exemption reflecting this constitutional command would be no more an establishment of religion than the exemption required for Sabbatarians in *Sherbert v. Verner*, 375 U.S. 398 (1963), or the exemption from the flat tax on book sellers held required for evangelists, *Follett v. McCormick*, 321 U.S. 573 (1944). Surely a statutory exemption for religionists required by the Free Exercise Clause is not an invalid establishment because it fails to include nonreligious believers as well; nor would it be any less an establishment if camouflaged by granting additional exemptions for nonreligious, but 'moral' objectors to war.

"On the assumption, however, that the Free Exercise Clause of the First Amendment does not by its own force require exempting devout objectors from military service, it does not follow that § 6(j) is a law respecting an establishment of religion within the meaning of the First Amendment. It is very likely that § 6(j) is a recognition by Congress of free exercise values and its view of desirable or required policy in implementing the Free Exercise Clause. That judgment is entitled to respect. Congress has the power 'to raise and support armies' and 'to make all laws which shall be necessary and proper for carrying into execution' that power. Art. I, § 8. The power to raise armies must be exercised consistently with the First Amendment which, among other things, forbids laws prohibiting the free exercise of religion. It is surely essential therefore—surely 'necessary and proper'—in enacting laws for the raising of armies to take account of the First Amendment and to avoid possible violations of the Free Exercise Clause." 38 L.W. at 4497.

Mr. Justice Blackmun, Circuit Justice in *United States v. Levy*, 419 F.2d 360 (8th Cir. 1969) joined in an opinion broadly construing "religious training and belief" under the Selective Service Act. In the case of *In re Weitzman*, F.2d —, 38 L.W. 2549 (8th Cir. 1970) in asserting the Constitutionality of distinguishing between non-religious and religious conscientious objection Justice Blackmun emphasized:

"The religious training and belief connection with conscientious objection came into the statute not as an establishment of religion but as a legislative accommodation of religious freedom. In the primary Seeger opinion, Mr. Justice Clark outlined the efforts of colonial, state, and federal governments to ameliorate the plight of persons of various faiths when called to bear arms. 380 U.S. at 169-73. It is fair to say that in the light of history, § 377 (a) is another example of what Mr. Chief Justice Hughes referred to as 'our happy tradition' of avoiding conflicts between belief and governmental necessity. *U.S. v. Macintosh*, 283 U.S. 605, 633-35 (1931.)

Catholic conscientious objection rests precisely upon the ground emphasized by the Supreme Court, to wit, religious belief that conscience in representing God, has more right to be obeyed than any law contrary to conscience:

"Since the right to command is required by the moral order and has its source in God, it follows that, if civil authorities legislate for or allow anything that is contrary to that order and therefore contrary to the will of God, neither the laws made nor the authorization granted can be binding on the consciences of the citizens, since God has more right to be obeyed than men." (Pope John XXIII *Pacem in Terris*, para. 51, April 11, 1963).

In view of the virtually uniform history of recognition by Congress and by the Supreme Court of religious objection to military service, so carefully outlined by Solicitor General Cox in his brief in *Seeger* and by Solicitor General Griswold

in his brief in *Welsh*, it is curious to find the Solicitor General asserting in the present case and in *United States v. McFadden*, No. 422, October Term, 1970, that Congress in section 6(j) of the Selective Service Act somehow regarded the Catholic's duty of obedience to God as of an inferior order to the duty of obedience to God of members of the traditional pacifist sects. Because of the statement of Catholic doctrine the Solicitor General contends that the Catholic conscientious objector should be subjected to disability from discharge if in the Army or to fine and imprisonment if the Catholic objector refuses induction pursuant to conscience.

The two reeds relied upon by the Solicitor General in the present cases upon examination prove to be very frail indeed. The first reed is the 1943 opinion of the Second Circuit in *United States v. Kauten*, 133 F.2d 703. The Solicitor General's brief in *Seeger* declared that:

"The Second Circuit, in *United States v. Kauten*, 133 F.2d 703, misconstrued the reason for the abandonment of the requirement of membership in an historic peace church . . . .

". . . *Berman v. United States* [distinguished] between a conscientious social belief . . . and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one.' "

"Both the *Berman* and *Kauten* decisions were before Congress when the present statute was adopted in 1948. Congress signified that *Berman* constituted the correct interpretation of its views by adopting the definition of 'religious training and belief' which the Ninth Circuit had borrowed from *Macintosh* . . ." (*Seeger* brief p. 70; *Welsh* appendix 55A).

For purposes of the present argument, the Solicitor General seeks to rehabilitate *Kauten* and relies upon an entirely gratuitous dictum in that case that the words "in any form" modified "war" rather than "participation" in section 6(j)

and that Congress intended to discriminate against religious objectors whose religion prohibited participation in any form only in unjust wars, but not all wars.

In point of fact, the defendant in *Kauten* was opposed to all war. The holding of *Kauten* is that political, as opposed to religious objection, is not ground for exemption:

"Though the registrant may have been entirely sincere in the ideas he expressed, his objections to reporting for induction were based on philosophical and political considerations applicable to this war rather than on 'religious training and belief.' \* \* \* We are not convinced . . . that registrant did not report for induction because of a compelling voice of conscience, which we should regard as a religious impulse . . . ." 133 F.2d at 707-708.

"The Registrant makes it quite clear that his religious training and belief is not the basis of his present opposition to war.

"There is no doubt that the Registrant is sincerely opposed to war but this belief emanates from personal philosophical conceptions arising out of his nature and temperament, and which is to some extent, political." 133 F.2d at 707, footnote 2.

In addition to deciding the case before the court, however, the *Kauten* opinion continued to express an opinion, unjustified in theology, contrary to Chief Justice Hughes in *Macintosh*:

"In order to avail himself of his privilege a registrant must establish that his objection to participation in war is due to 'religious training and belief.' It must *ex vi termini* be a general scruple against 'participation in war in any form' and not merely an objection to participation in this particular war.  
\* \* \*

"There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any cir-

cumstances. The latter and not the former, may be the basis of exemption under the Act."

The court continues:

"The former is *usually* a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has been thought a religious impulse." 133 F.2d at 708 [emphasis added]

Theologically, any individual is free to adopt views of the Second Circuit on the one hand that just war objectors are not acting pursuant to religious training and belief, or the teaching of Aquinas, Pope John XXIII, Pope Paul VI and Vatican II on the other hand than Catholics acting upon the Catholic just war teaching do indeed have a duty to God to obey conscience.

Legally, however, the *Kauten* dictum found favor neither with the Supreme Court nor with Congress.

The government has not yet explained how dictum in the Second Circuit in 1943 can overcome the square holding of the Supreme Court in *Sicurella* twelve years later:

"The test is not whether the registrant is opposed to all war, but whether he is opposed on religious grounds to *participation* in war." 348 U.S. 385 at 388 (1955).

In *Sicurella v. United States*, 348 U.S. at 385, 388 (1955) the defendant was denied classification as a conscientious objector on the recommendation of the Department of Justice:

" 'While the registrant may be sincere in the beliefs he has expressed, he has, however failed to establish that he is opposed to war in any form. As indicated by the statements on his SSS Form No. 150, registrant will fight under some circumstances, namely in defense of his ministry, Kingdom interests, and in defense of his fellow brethren.' "



The Supreme Court dismissed the Department of Justice construction of the Act with the severe comment:

"Granting that these articles picture the Jehovah's Witnesses as anti-pacifists extolling the ancient wars of the Israelites and ready to engage in a 'theocratic war' if Jehovah so commands them, and granting that the Jehovah's Witnesses will fight at Armageddon, we do not feel this is enough. The test is not whether the registrant is opposed to all war, but whether he is opposed on religious grounds, to *participation* in war. [Emphasis in original.] As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not appear to contemplate one in the future." 348 U.S. at 390-391.

Catholics, like Jehovah's Witnesses, follow God's commands over those of man; and Catholics as set out in Negre's application for discharge explicitly characterize conscience as representing the voice of God. If participation in war violates the Catholic's conscience, Catholic doctrine is clear that the individual Catholic has a duty to comply with his own conscience and to refuse military service.

Petitioner in this case is no more required to become a Jehovah's Witness to qualify for exemption from military service than he is required to become a Quaker: The First Amendment affords Petitioner equal protection in the exercise of his religious belief when—in refusing military service which would violate conscience—the Catholic's conduct is the same as that of the Jehovah's Witness or the Quaker's.

The Ninth Circuit in 1954 rejected the error now urged by the government upon this court. In *Shepherd v. United States*, 217 F.2d 942 (9th Cir. 1954) the registrant was granted exemption from military service despite his statement:

"I am not a pacifist because when God commands me to fight, I will. I will fight to defend my

ministry and my brethren, to do the will of my father who is in heaven." (Matt. 12:50). 217 F.2d 942 at 944 fn. 2.

The court followed *Hinkle v. United States*, 216 F.2d 8 (9th Cir. 1954) holding that belief in self defense or the righteousness of theocratic wars did not necessarily negative conscientious objection.

*Taffs v. United States*, 208 F.2d 329 at 331 (8th Cir. 1953) cert. denied 347 U.S. 947 (1954) held:

"Whether a certain war is theocratic or not is a matter of religious belief into which we are forbidden to delve. Appellant's positive and uncontradicted testimony was that he was conscientiously opposed to participation in war because he regarded his duties to Jehovah as being superior to any duties arising out of human relationships. This testimony not being impeached, the test of the statute was met."

Since the authoritative construction by the Supreme Court in *Sicurella* that the words "in any form" modify "participation" and not "war", Congress has amended Section 6 of the Selective Service Act in 1957, 1958, 1961, 1962, 1963, 1964 and 1967. Upon each reenactment of Section 6(j), Congress retained the same word order involved in *Sicurella*, thus, by implication, ratifying the construction of Section 6(j) in *Sicurella*.

With the other government reed supporting its construction of Section 6(j) to discriminate against Catholics we can be briefer.

*United States v. Spiro*, 384 F.2d 159 (3rd Cir. 1967) cert. denied 390 U.S. 958 (1968) (Justice Black and Justice Douglas were of the opinion that cert. should be granted) held:

"Appellant claims that the granting of conscientious objector status to Jehovah Witnesses who will fight only in a theocratic war and the denial of such status to a Catholic who will fight only in a 'just war' violates his federally protected right to religious

freedom and to equal protection of the law. Both the Selective Service authorities and the District Court found that appellant did not meet the statutory test for granting of conscientious objector status. See 40 U.S.C. App. § 456(j) (1964). We have authority to reverse only if there has been a denial of basic procedural fairness or if the conclusion of the board is without any basis in fact. *Estep v. United States*, 237 U.S. 114 (1946) . . . ."

"After thoroughly reviewing the record we can only conclude that appellant's classification did have a factual basis. Once this conclusion is reached, we are without jurisdiction to delve into the legal and theological implications of appellant's beliefs." 384 F.2d at 160-161.

If *Spiro* means that the words "in any form" modify "war", then it is inconsistent with *Sicurella* and in error.

*United States v. Curry*, 410 F.2d 1297 (1st Cir. 1969) cites *Spiro* and *Sicurella* but does not even attempt to reconcile the inconsistency between them.

If *Spiro* simply reads section 10(b) (3) and *Estep* literally, that the findings of the Selective Service System are final even if based upon a misinterpretation of the Selective Service Act or a violation of the Constitution, then *Spiro* is wrong under *Ostereich v. Selective Service*, 393 U.S. 233 (1968); *McKart v. United States*, 395 U.S. 185 (1969); and *Gutknecht v. United States*, 396 U.S. 295 (1970). Each of the Supreme Court cases upsets a finding of the Selective Service System well sustained by the evidence because the System applied an illegal or erroneous standard. Indeed, for a court to impose severe punishment under an unconstitutional statute or one improperly construed would be a conspicuous denial of due process, in violation of the constitution which the courts are sworn to uphold. Cf. *Crowell v. Benson*, 285 U.S. 22 (1932); *Goldberg v. Kelly*, 25 L.Ed. 2d 287 (1970); *Yakus v. United States*, 321 U.S. 414 (1944).

For the reasons stated, the construction of Section 6(j) of the Selective Service Act proposed by the government to

discriminate against Catholics upon account of the statement of the Catholic religious doctrine is unsound and should be rejected. On the contrary, Section 6(j) should be construed to afford Catholics refusing military service obedient to conscience discharge from military service.

### CONCLUSION

For the reasons stated, Section 6(j) and the corresponding Army Regulation should be declared unconstitutional if they discriminate against Catholics prohibited by conscience formed under Catholic religious training and belief from participating in military service.

In the alternative, Section 6(j) and the Army regulation should be construed to accord equal treatment to Catholic conscientious objectors as to members of traditional pacifist sects, and Negre should be discharged.

Dated: September 13, 1970.

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**APPENDIX****Pertinent Provisions of the Constitution,  
Statutes and Administrative Regulations**

The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

The Fifth Amendment provides:

"No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

Section 6(j) of the Military Selective Service Act of 1967,  
50 U.S.C. App. § 456(j) provides in pertinent part:

"(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological or philosophical views, or a merely personal moral code."

Department of Defense Directive 1300.6 dated May 10, 1968 provides in pertinent part:

**"IV. POLICY**

A. *National Policy.* The fact of conscientious objection does not exempt men from the draft. However, the Congress, as indicated by provisions of P.L. 90-40 (reference (c) ) and related statutes, has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces and accordingly has provided that a person having bona fide religious objection to participation in war in any form (1-0 classification) shall not be inducted into the Armed Forces but will be required to serve his country for the same period of time in civilian work contributing to the

maintenance of national health, safety, or interest under a civilian work program administered by Selective Service.

B. *DoD Policy.* Consistent with this national policy, bona fide conscientious objection as set forth in this Directive by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable. Objection to a particular war will not be recognized."

Army Regulation 635-20 provides in pertinent part:

"3. *Policy.* a. Consideration will be given to requests for separation based on bona fide conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the active military service."

\* \* \*

"Requests for discharge after entering military service will not be accepted when—

(1) Based solely on conscientious objection which existed, but which was not claimed prior to induction, enlistment, or entry on active duty or active duty for training.

(2) Based solely on conscientious objection claimed and denied by the Selective Service System prior to induction.

(3) Based on essentially political, sociological, or philosophical views, or on a merely personal moral code.

(4) Based on objection to a particular war."

IN THE  
Supreme Court of the United States  
October Term, 1970

U.S. COURT, U.S.  
FILED  
OCT 9 1970  
STANLEY, CLERK

No. 325

LOUIS A. NEGRE

v.

STANLEY R. LARSEN, *et al.*

On Writ of Certiorari to the United States  
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**BRIEF OF AMERICAN JEWISH CONGRESS,  
AMICUS CURIAE**

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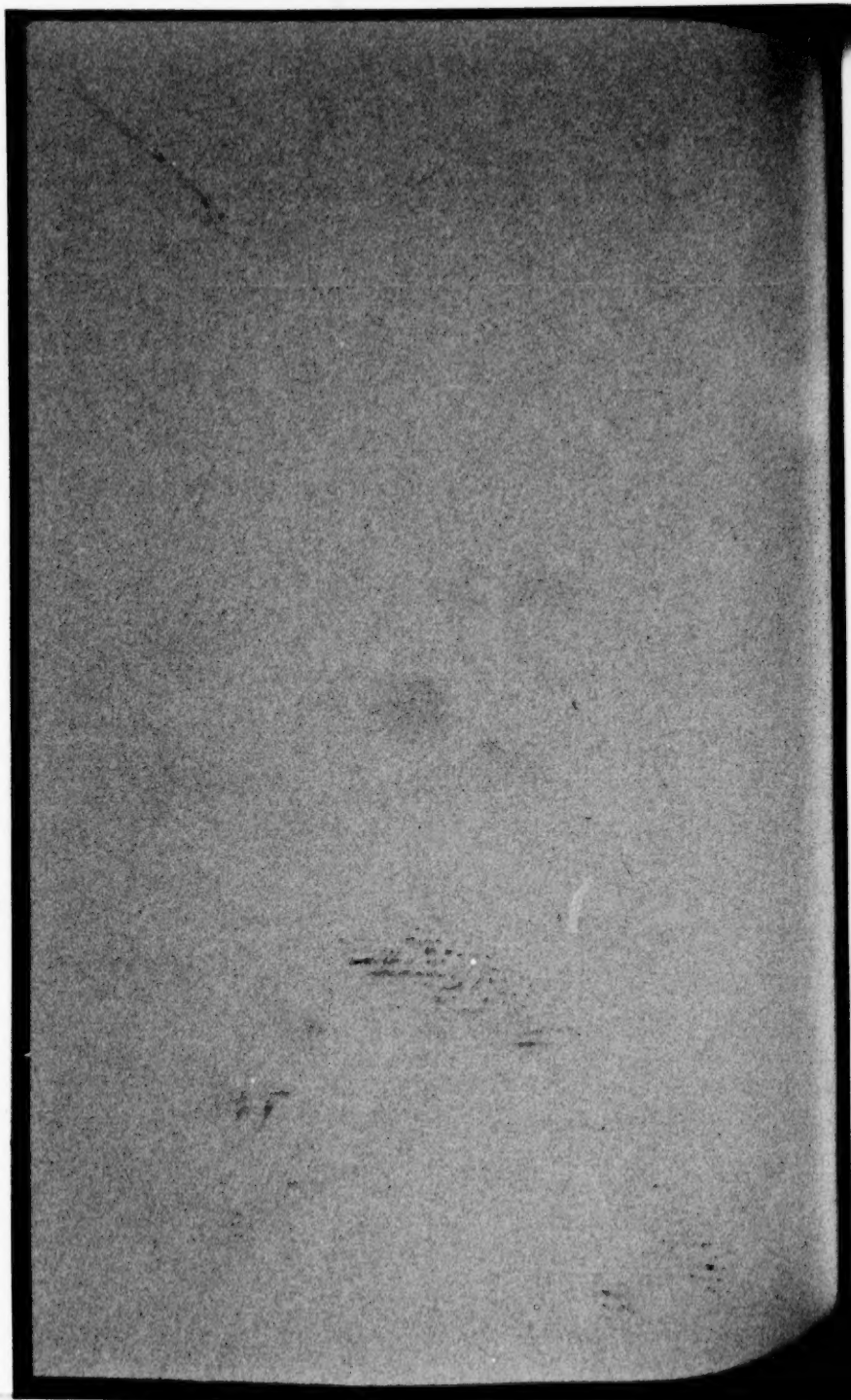
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**BRIEF OF AMERICAN JEWISH CONGRESS,  
AMICUS CURIAE**

---

**Interest of the *Amicus***

The American Jewish Congress is a national organization of American Jews, founded more than 50 years ago to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy. We are especially committed to preservation of the great freedoms secured by the First Amendment. Since the case before the Court raises issues concerning the First Amendment's guaranty of religious liberty and the separation of

church and state, we have sought and obtained the consent of the parties to the submission of this brief *amicus curiae*.

### **Preliminary Statement**

The petitioner, Louis A. Negre, was classified 1A and submitted to induction on August 29, 1967. After receiving training, he was ordered to report to duty in Vietnam. Thereafter his application for discharge as a conscientious objector pursuant to Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. 456(j)) was denied. In a subsequent application for discharge, Negre asserted that service in Vietnam on his part "would be violating my own concepts of natural law and would be going against all that I had been taught in my religious training." Negre, who was born a Catholic and attended Catholic schools from Grades 1 to 12, cited statements by Catholic authorities in support of his position.

After a hearing on his application, the hearing officer found that there was no doubt that Negre's objection to service in Vietnam was sincere and was based on his religious training. However, since Negre was not conscientiously opposed to all types of war, the officer recommended rejection of his application and it was rejected by the Army Department. After again being ordered to serve in Vietnam, Negre initiated this habeas corpus proceeding. His petition was denied by the District Court which concluded that the Department's finding that Negre did not object to all wars was supported by the record. The Court of Appeals for the Ninth Circuit affirmed.

## **Question to Which This Brief Is Addressed**

This brief is addressed solely to the question whether Congress may constitutionally limit the draft exemption of conscientious objectors to those who are opposed to participation in war in any form.

## **Constitutional and Statutory Provisions Involved**

The First Amendment to the United States Constitution provides in part as follows:

Congress shall make no law respecting an establishment of religion, \* \* \*

Section 6(j) of the Military Selective Service Act of 1967, 50 U.S.C. App. §456(j) provides, in part, as follows:

(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. \* \* \*

## **Summary of Argument**

The provision in Section 6(j) of the Military Selective Service Act of 1967 limiting the exemption from military service on the basis of conscientious objection to those whose objection is to all wars constitutes preferential treat-

ment of adherents of some religious or ethical systems over others, in violation of the No-Establishment Clause of the First Amendment.

A. This Court has firmly established that the First Amendment requires equality in the treatment of religious groups by the Government. Previous decisions of this Court suggest that, to avoid apparent violation of this principle, the draft law must be construed as according equal treatment to beliefs that are functionally equivalent. In this case, petitioner's objection to service is functionally equivalent to the objections of those who are concededly granted exemption in Section 6(j). Unless the statute is so construed, the Government and the reviewing courts must necessarily become involved in the kind of controversies over religious doctrine from which they are barred by the Constitution.

B. There is no question here that petitioner's objection to service in some but not all wars is based on a sincerely-held set of beliefs derived from his Catholic upbringing. That religious doctrine can prompt such selective objection is hardly open to question. For example, a basis for such objection can clearly be found in the traditions of Judaism.

C. Section 6(j) as construed and applied here has the effect of discriminating among religions. Petitioner should not be required to become a member of those sects that object to all wars in order to have his conscientious objection recognized.



D. The distinction made by the statute among religious groups is unreasonable. It fails to meet the test of compelling governmental interest which has been applied by this Court in passing on challenged limitations on First Amendment freedoms.

## ARGUMENT

**Limiting exemption from military service on the basis of conscientious objection to those whose objection is to all wars constitutes preferential treatment of adherents of some religious or ethical systems over others in violation of the No-Establishment Clause of the First Amendment.**

### A. Equality Among Sects

In its oft-cited interpretation of the No-Establishment Clause of the First Amendment in *People ex rel. Everson v. Board of Education*, 330 U. S. 1, 15-16 (1947), repeatedly affirmed thereafter,<sup>1</sup> this Court made it clear that "Neither a state nor the Federal Government can \* \* \* prefer one religion over another." This principle was spelled out in the *Schempp* case, *supra*, as follows (347 U. S. at 214):

Almost a hundred years ago in *Minor v. Board of Education of Cincinnati*, Judge Alphonso Taft, father of the revered Chief Justice, in an unpublished opinion stated the ideal of our people as to religious freedom as one of "absolute equality before the law, of all religious opinions and sects \* \* \*.

1. *People ex rel. McCollum v. Board of Education*, 333 U. S. 203, 210-211 (1948); *McGowan v. Maryland*, 366 U. S. 420, 443 (1961); *Torcaso v. Watkins*, 367 U. S. 488, 492-493 (1961); *School District of Abington Township, Pa. v. Schempp*, 374 U. S. 203, 216 (1963).

In *United States v. Seeger*, 326 F. 2d 846 (2d Cir., 1964), affirmed, 380 U. S. 163 (1965), the Court of Appeals for the Second Circuit rested its decision in favor of Seeger expressly on the ground that Section 6(j), as it then stood, unconstitutionally discriminated against those religions that did not include a belief in a Supreme Being. It held that, under this Court's decision in *Torcaso v. Watkins*, *supra*, "Government could not \* \* \* place the power and authority of the state 'on the side of one particular sect of believers.' " 326 F. 2d at 853. Although this Court affirmed that decision on statutory rather than constitutional grounds, nothing in its opinion undermines the validity of the Court of Appeals' conclusion on this point.

The *Seeger* decision, we submit, strongly implies that the Constitution prohibits any interpretation of the draft law which requires a conscientious objector to subscribe to any particular form of theological or doctrinal statement. Seeger was a product of a devout Roman Catholic home and he was a close student of Quaker beliefs, but he declined to subscribe to a belief in an orthodox definition of Supreme Being. This Court held (380 U. S. at 184-185):

Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's "Supreme Being" or the truth of his concepts. But these are inquiries foreclosed to Government. \* \* \* Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.

The Court emphasized that, to avoid constitutional questions, the draft law should be construed to accord equal treatment to beliefs which are functionally equivalent despite differences in doctrinal phrasing or theological statement. It said (at 165-166):

We believe that under this construction, the test of belief "in relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualified for the exemption.

Here, Negre's objection plainly rested on beliefs occupying a place in his life paralleling the beliefs that qualify for exemption. His conscientious objection rests precisely upon the ground emphasized by the Court, i.e., religious belief that conscience, representing God, has more right to be obeyed than any law contrary to conscience:

Since the right to command is required by the moral order and has its source in God, it follows that, if civil authorities legislate for or allow anything that is contrary to that order and therefore contrary to the will of God, neither the laws made nor the authorizations granted can be binding on the consciences of the citizens, since God has more right to be obeyed than men. (Pope John XXIII, *Pacem in Terris*, page 142a, April 11, 1963.)

The statutory limitation of the exemption to those who object to "war in any form" has already been cast in doubt. In *Sicurella v. United States*, 348 U. S. 385 (1955), a member of the Jehovah's Witnesses was denied classification as a conscientious objector on the recommendations of the

Department of Justice which found (as quoted in this Court's decision, at 388):

While the registrant may be sincere in the beliefs he has expressed, he has, however, failed to establish that he is opposed to war in any form. As indicated by the statements on his SSS Form No. 150, registrant will fight under some circumstances, namely in defense of his fellow brethren.

This Court, however, upheld the registrant's claim to exemption, saying (at 390-391):

Granting that these articles picture Jehovah's Witnesses as anti-pacifists, extolling the ancient wars of the Israelites and ready to engage in a "theocratic war" if Jehovah so commands them, and granting that the Jehovah's Witnesses will fight at Armageddon, we do not feel this is enough. The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war. [Emphasis in original.] As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not appear to contemplate one in the future.

Crucial to the Court's decision, we believe, was not the Court's passing observation that future theocratic war was not contemplated by the Jehovah's Witnesses but its view that governmental inquiry should cease once the sincere conscientious religious objection to participation in war is ascertained. Probing into the particular objector's understanding of the tenets of his faith would be foreclosed. It is the deeply felt sincerity of the belief and the command of the conscience that is vital, not whether the belief ex-

tends to all wars or can be characterized as "traditional" or "orthodox."

If we are wrong in this, it follows that the decision in *Sicurella* raises constitutional questions of a substantial nature. In effect, it requires draft boards and reviewing courts to base their determinations on the content of the religious views of the registrant. This, indeed, is a fundamental defect of Section 6(j), as here construed. It requires government officials to analyze the nature of the registrant's ethical system to determine the scope of his objection. This necessarily involves the government in "controversies over religious doctrine." *Presbyterian Church, etc. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440, 449 (1969).

This Court itself has had difficulty with such theological questions. Cf. *Church of Jesus Christ of Latter Day Saints v. United States*, 136 U. S. 1 (1890); *United States v. Ballard*, 322 U. S. 78 (1944). A strong constitutional policy against involvement of civil agencies in the area of theology has been reflected repeatedly in decisions of this Court. *Watson v. Jones*, 80 U. S. 679 (1871); *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94 (1952); *Kreshik v. St. Nicholas Cathedral*, 363 U. S. 190 (1960); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, *supra*. As this Court said in *United States v. Ballard*, *supra*, 322 U. S. at 87: "When the triers of fact undertake that task [determination of truth or falsity of religious belief], they enter a forbidden domain."

The burden of our position here is that Section 6(j) enacts an impermissible discrimination among religious

sects. We do not contend that anyone has a constitutional right to exemption from military service because of conscientious objection. We contend only that Congress has drawn an improper distinction as to who may be exempted.

It is sometimes argued that, if selective conscientious objection is permitted, a person who objects to a particular war will be permitted to refuse to pay taxes for its support. The analogy is false because the law does not now waive taxes for conscientious objectors to all wars. It does, however, grant military exemption to such objectors and the issue is whether it may constitutionally limit the exemption in that fashion.

The analogy between objection to military service and objection to the payment of war taxes was made years ago by Justice Cardozo in his concurring opinion in *Hamilton v. Regents*, 293 U. S. 245, 268 (1934). In that case, however, the issue was not discrimination between different types of objection but whether students could constitutionally be denied access to a state university because they refused to take military training. Hence, it could there be argued that recognition of a constitutional right to enjoy state benefits free of a requirement of military service would necessarily establish a right to enjoy all state benefits without paying taxes.

We do not believe that that conclusion necessarily follows. There is a vast difference between requiring a man to bear arms and perhaps to kill in violation of his conscience and requiring him to pay taxes for what he regards as wrongful or immoral purposes. In any case, however, Justice Cardozo's argument does not apply in this case,

where the issue is not constitutional right but the constitutional validity of a statutory classification.

### **B. The Ethical Nature of Selective Objection**

The fact that a registrant can be genuinely motivated by his religious beliefs to object to some but not to all wars is hardly open to question. Indeed, it is not disputed here that Negre's objection is based on a sincerely held set of beliefs derived from his Catholic upbringing.

We shall not attempt an extensive demonstration that religious systems do distinguish among wars in deciding whether there is a moral requirement to refrain from participation. In a sense, any such presentation is irrelevant to the issues in this case. Even within the assumption that the statutory exemption is validly limited to religious objectors to all wars, determinations must be made on the basis of the registrant's own religious system, not on whether there is a body of belief officially established by a religious body for all its followers. As this Court said in *Seeger* (380 U. S. at 184), " \* \* \* it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways." However, it is useful to show that there are elements in Jewish law which could rationally persuade some Jews to believe that selective resistance to war is a moral imperative.

Like Catholicism, Judaism is not a religion of traditional pacifism. Indeed, from the conquest of Canaan to the Maccabee wars of religious freedom, from Bar Kochba to the Warsaw Ghetto, and currently in Israel's war against

annihilation and genocide, the history of the Jewish people abounds with instances of wars and battles for survival. Although the people of Israel often proclaimed that they were fighting in God's name the battles of the Lord, the Jewish tradition has in fact distinguished between obligatory and imperative wars of self defense and wars of choice.<sup>2</sup>

However, even when wars were fought for obligatory and imperative reasons, Jewish tradition recognized that killing was an offense before God and a sin offering was required of all soldiers. Indeed, certain strategies were deemed impermissible regardless of the ends sought. Deuteronomy 20 *passim*; Joshua 11:19. Specifically, it is laid down in Deuteronomy 20:19-20, that:

When in your war against a city you have to besiege it a long time in order to capture it, you must not destroy its trees, wielding an axe against them. You may eat of them, but you must not cut them down. Are trees of the field human to withdraw before you under siege? Only trees which you know do not yield food may be destroyed. \* \* \*

Maimonides declares (Code, Treatise on Kings and Wars, Ch. VIII, Law 7):

When siege is laid to a city for the purpose of capture, it may not be surrounded on all four sides but only on three in order to give an opportunity to those who would flee to save their lives \* \* \*

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2. See Rabbi Seymour Siegel, *Judaism and World Peace: Focus Viet Nam*, Synagogue Council of America (1966), p. 13; Gendler, Everett E., "War and the Jewish Tradition in A Conflict of Loyalties; the Case for the Selective Conscientious Objector," James Finn, ed. (1968).



Jewish law provided for an extensive system of exemptions from military service in all unjust wars, leaving the final determination on what constitutes unjust wars to the individual rather than the community. Viewed historically, Jewish law reflects an early acceptance of the reality of war begetting over the years an increasingly anti-war religious tradition.

One element in the anti-war tradition was Isaiah's prophecy of universal peace (Isaiah 2:4, Micah 4:3); thus, Zachariah 4:6: "Not by might nor by power but by my spirit, saith the Lord of Hosts." (See also: Jeremiah 17:5; Isaiah 30:15, Hosea 1:7.) This prophetic ideal was above all a standard of conduct. Jewish ethics postulates that Jews must not only acknowledge absolutes of perfection, but continuously strive on earth to approach them in action. In this sphere, each Jew must live his life as if the whole world hangs on his deeds. The *Midrash* says (*Leviticus Rabbah*, T3 av IX.9):

R. Simeon b. Yohai said: Great is peace, since all blessings are comprised therein, as it is written, The Lord will give strength unto His people; the Lord will bless His people with peace (Ps xxix, 11). Hezekiah said two things. Hezekiah said: Great is peace, for in connection with all other precepts it is written, If thou meet, etc. (Ex. xxiii, 4). If thou see (ib. 5), If there chance (Deut. xxii, 6), which implies: if a precept comes to your hand, you are bound to perform it. In this case, however, (it says), Seek peace, and pursue it (Ps. xxxiv, 15), (meaning) seek it for thine own place and follow it to another place.

This, in turn, is further strengthened by specific teachings and laws (*Talmud, Sanhedrin*, 74a):

In every other law of the Torah, if a man is commanded "transgress and suffer not death" he may transgress and not suffer death, excepting \* \* \* shedding blood. Murder may not be practiced to save one's life. \* \* \* Even as one who came before Raba and said to him, "the Governor of my town has ordered me 'Go, and kill so and so, if not, I will slay thee.'" Raba answered him, "let him rather slay you than that you should commit murder; who knows that your blood is redder? perhaps his blood is redder?"

*Midrash Pesikta Rabatti*, 21:18, teaches that "The commandment against killing corresponds to the commandment that we believe in God, for man is created in God's image." Similarly, we learn in *Talmud, Mishnah Sanhedrin*, IV, 5, that "One man alone was brought forth at the time of creation, in order to teach us that he who destroys one human soul is regarded as though he had destroyed a whole world, while he who preserves one soul within humanity is regarded as though he had preserved a whole world." According to *Talmud, Avot D'Rabbi Natan B*, pursuit of peace equals all the commandments of the Torah. Similarly, in *Midrash, Sifra*, Rabbi Akiba teaches that "thou shall love thy neighbor as thyself" is the greatest principle in the Jewish ethics, but Rabbi Azzai responds that the sentence, "this is the book of the generations of man" (Genesis 5:1) is even greater.

This distinct current of Jewish anti-war ethic dictated that King David himself was not permitted to build the Temple in Jerusalem because his hands had spilled blood in battle. Precisely at the height of their persecutions, Jews spoke most emphatically of their love of all men, including the foe.<sup>3</sup> From the earliest admonitions of "choose

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3. Leo Baeck, *The Essence of Judaism*, 216.

life" (Deuteronomy 30:19) and "blood, it polluteth the land" (Numbers 35:33), to Elijah's discovery of the "still small voice" within him (Kings I, 19:12), the conscience of the Jew within his community is to search, to strive and never to complacently accept his ethical choices as ideal.<sup>4</sup>

Against this background, a majority of Jews remain anti-pacifist, a large segment of American Jewry is selectively pacifist, and a small minority choose total pacifism.<sup>5</sup>

It is the duty of a rabbi to assist in the search for the Jew's "absolute becoming."<sup>6</sup> A rabbi's duty to impart learning, and the duty of every Jew to strive towards ethical perfection, are the most demanding because of the relative dearth of dogmas and absolutes in Judaism; it is an exacting search, all-compelling in its demands.<sup>7</sup>

What matters is not what authority teaches but what the individual believes. "Judaism considers each individual personally responsible before God for his action."<sup>8</sup> As stated by Rabbi Arthur J. Lelyveld:<sup>9</sup>

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4. A. J. Heschel, *God in Search of Man*, 10.

5. See Cronbach, Abraham M., 46 Yearbook of the Central Conference of American Rabbis 198 (1936); Rabbi Maurice N. Eisen-drath, *Can Faith Survive*, McGraw & Hill; 16 Tidings of the Jewish Peace Fellowship 3 (1969); "Non-Violence in the Talmud." 17 *Judaism* at 321, et seq., 1968; Rabbi Immanuel Jakobovitz, *Comment on Sanhedrin*.

6. Gershom G. Scholem, *Major Trends in Jewish Mysticism*, 13.

7. "And thou shall love the Lord thy God with all thy heart \* \* \*" Deuteronomy 6:5.

8. Resolution on "Conscientious Objection" adopted by the Commission on Social Justice of the Synagogue Council of America and referred for approval to the Plenum of the Synagogue Council.

9. *Judaism and World Peace*, p. 26.

In the realm of conscience every individual is in the last analysis alone with the Ribono Shel Olam, the source of Ultimate Demand. In Judaism, the nature of that demand is illuminated by the experience of the group which preserves it and transmits it. Out of our history and our affirmations we have a developed value-stance from which we approach the situations that require decision and from which we test the validity of the ideals that are normative in our tradition.

### C. The Discriminatory Effect of Section 6(j)

The effect of Section 6(j), as construed and applied here, is to discriminate on the basis of religious belief among those draft registrants who assert a conscientious objection to service. Those registrants whose religious training dictates objection to service in all wars are exempted; those whose religious training just as compellingly dictates objection to service in a particular war or wars are not.

The petitioner here, like the petitioner in *Sicurella v. United States*, *supra*, follows God's commands over those of man and believes conscience to represent the voice of God. It is true, of course, that Catholics may participate in wars if they believe that such participation is consistent with the commands of God.<sup>10</sup> But the relevant condition in this case for such participation in war is that the Catholic finds participation not contrary to his conscience, for if participation in the war violates the Catholic conscience, Catholic doctrine is clear that the individual Catholic has a

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10. We note also that, although Quaker doctrine is said to prohibit discrimination in any way at any time, many Quakers choose to make an exception for wars which they consider particularly just. This concession is even more compelling in its application to Jews.

duty to comply with his conscience and refuse military service. Thus, Catholicism eschews the test of what others may believe and elevates to the level of a dogma the duty of its followers to obey their conscience.

The petitioner should not be required to become a Jehovah's Witness to qualify for discharge from military service, nor should he be required to become a Quaker. The First Amendment, we submit, affords him equal protection in the exercise of his religious belief when—in refusing military service which would violate conscience—his conduct as a Catholic is the same as that of the Jehovah's Witness or the Quaker.

#### **D. The Distinction Made in Section 6(j) Is Unreasonable.**

For legislation abridging a liberty secured by the First Amendment a rigorous test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas v. Collins*, 323 U. S. 516, 530 (1945). "Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill v. Alabama*, 310 U. S. 88, 95-96 (1940); *Sherbert v. Verner*, 374 U. S. 398, 406 (1963). See also *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 639 (1943).

This Court recently had occasion to make clear that this approach applies generally to all fundamental constitu-

tional rights. In *Shapiro v. Thompson*, 394 U. S. 618 (1969), it rejected reasonable considerations of convenience in invalidating state laws limiting welfare benefits to persons who had resided a minimum length of time within the state. After referring to the holding in *United States v. Guest*, 383 U. S. 745 (1966) that the right to travel among the states "occupies a position fundamental to the concept of our Federal Union" (at 630), this Court said (at 634):

At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification \* \* \* [A]ny classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional. (Emphasis in original.)

The *Torcaso* case, *supra*, provides an example of the application of this approach. Absent the First Amendment, it could not be said that the state's apparent determination there that believers in God are likely to be more honest and conscientious civil servants than nonbelievers was arbitrary and unreasonable. Indeed, the state there argued that it could hardly be deemed unreasonable to require that a notary public (the office involved in that case) who is given the power to administer oaths himself believe in God. Brief for Appellee in *Torcaso* (October Term 1960, No. 373), p. 19. As noted by the Court in *Sherbert v. Verner*, *supra*, 374 U. S. at 410n, there was in *Torcaso* "an undoubted state interest in ensuring the veracity and trustworthiness of Notaries Public." But the answer, as *Torcaso* makes clear, is that there are certain classifications which the First Amendment forbids government to make,

irrespective of their possible factual reasonableness, and one of these is a classification which distinguishes among religions.

The Sunday Law cases, and specifically *Gallagher v. Crown Kosher Market*, 366 U. S. 617 (1961), and *Braunfeld v. Brown*, 366 U. S. 599 (1961),<sup>11</sup> are not inconsistent with this assertion. The Court there held that Sunday laws are today secular laws for the purpose of ensuring a uniform day of rest, and that the states are not constitutionally required to accord exemptions for religious reasons. But nothing in the Court's decision can be interpreted to give any support to an argument that the states could constitutionally exempt adherents of certain non-Christian religions from the operation of the statute while withholding the exemption from adherents of other faiths. We are confident that this Court would not uphold a statutory exemption to Sunday laws in favor of only those who observe Saturday as their holy day of rest but deny it to those who, with equal religious sincerity, observe Friday as their holy day of rest. Nor, we suggest, would the unconstitutionality of such a classification be mitigated by a not unreasonable state finding that policing problems would be much more difficult if the exemption were not limited to a single, specific day.

Nor can *Torcaso* be distinguished because in the present case the governmental interest involved is national defense. The interest of national defense might justify a refusal by Congress to grant any exemption from military service on grounds of conscience. *United States v.*

11. We suggest that the force of these decisions has been substantially weakened by *Sherbert v. Verner*, *supra*.

*Macintosh*, 283 U. S. 605, 623-624 (1931); *Hamilton v. Regents of the University of California*, 293 U. S. 245, 263-265 (1934); *In re Summers*, 325 U. S. 561, 571-573 (1945). But, we submit, nothing in those decisions supports the conclusion that, once Congress has elected to grant exemption to those who conscientiously object to military service, it can limit that exemption to those who object to all wars, excluding those who object, just as sincerely, to a specific war or wars.

There was a time when assertion of the needs of national defense almost foreclosed all further judicial inquiry and freed government from the restraints imposed by the Bill of Rights. Cf. *Abrams v. United States*, 250 U. S. 616 (1919); *Hirabayashi v. United States*, 320 U. S. 81 (1943); *Korematsu v. United States*, 323 U. S. 214 (1944). Fortunately, that time has passed and hopefully will not return. Cf. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943); *Ex parte Endo*, 323 U. S. 283 (1944); *Harmon v. Brucker*, 355 U. S. 579 (1958); *Kennedy v. Mendoza-Martinez*, 372 U. S. 144 (1963).

We submit that no "compelling national interest" justifies the distinction among religions made by Section 6(j) as applied here. We do not believe that any claim can be made that administration of the draft laws requires exclusion of selective conscientious objectors from exemption. There is no reason to believe that it is peculiarly difficult to pass upon the validity of assertions of selective objection. Indeed, a far more compelling case of a risk of abuse of the exemption provisions was made, and found less than compelling by this Court, in the *Seeger* case and in *Welsh*



v. *United States*, 90 S. Ct. 1792 (1970). The vague formulas as to "religious" belief which were found acceptable by this Court in those cases were far less well documented than Negre's claim to religious objection to a specific war.

### Conclusion

**In the spirit of the Jewish tradition of respect for the dictates of the individual human conscience, we respectfully urge this Court to construe Section 6(j) of the Military Selective Service Act of 1967 as permitting military discharge for the Catholic who in conscience cannot participate in a particular war.**

Respectfully submitted,

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September, 1970.

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# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 85

GUY PORTER GILLETTE, PETITIONER

v.

UNITED STATES OF AMERICA

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No 325

LOUIS A. NEGRE, PETITIONER

v.

STANLEY R. LARSEN, COMMANDING GENERAL, ET AL.

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*ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS  
OF APPEALS FOR THE SECOND AND NINTH CIRCUITS*

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**BRIEF FOR THE UNITED STATES**

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**OPINIONS BELOW**

The decision of the court of appeals in No. 85 is reported at 420 F. 2d 298; the decision of the court of appeals in No. 325 is reported at 418 F. 2d 908. The decisions of the district courts are unreported.

(1)

**JURISDICTION**

The judgment of the court of appeals in No. 85 was entered on January 9, 1970, and the petition for a writ of certiorari was filed on February 11, 1970. The judgment of the court of appeals in No. 325 was entered on November 6, 1969, and the petition for a writ of certiorari was filed on February 5, 1970. Both petitions were granted on June 29, 1970. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether the Military Selective Service Act, and the corresponding military regulations, provide exemptions from combatant or other military service for "selective" conscientious objectors, whose scruples relate only to a particular conflict and not to war in any form.

2. Whether the legislative judgment not to excuse "selective" conscientious objectors violates the principles of religious neutrality and equal protection underlying the First and Fifth Amendments.

**STATUTE INVOLVED**

50 U.S.C. App. (Supp. V) 456(j), § 6(j), provides:

Nothing contained in this title \* \* \* shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form \* \* \* Any person claiming exemption from combatant training and service because

of such conscientious objections \* \* \* shall, if he is inducted into the armed forces \* \* \* be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered \* \* \* to perform \* \* \* civilian work contributing to the maintenance of the national health, safety, or interest \* \* \*.

#### STATEMENT

##### No. 85

After a jury trial in the United States District Court for the Southern District of New York, petitioner Gillette was convicted of having wilfully refused to report for induction as ordered, in violation of 50 U.S.C. App. (Supp. V) 462. He was sentenced to two years' imprisonment.

Gillette originally registered with his local board in Yonkers, New York on March 4, 1964. After working as a photographer's assistant for one year, he became a full-time student at the Neighborhood Playhouse School of the Theatre in New York City, studying for two years to become an actor.

On April 29, 1967, petitioner wrote his local board to request SSS Form 150, the special application form for conscientious objectors. He stated (G. App. 23) that he was requesting an exemption because "I believe that the United States Government is using all the brutal instruments of modern war against a poor peasant population which simply claims the right to have a government of its own free choice."



Alluding to "the Treaty of London of 1945 (Nuremberg Charter) which outlaws the 'waging of a war of aggression,' " he stated that "I object to any assignment in the United States Armed Forces while this unnecessary and unjust war is being waged, on the grounds of religious belief specifically 'Humanism'" (*ibid.*). Subsequently, in response to the question in Form 150 as to the circumstances under which he believed in use of force, petitioner wrote as follows (G. App. 26).

For the personal protection of self and other individual persons.

To enforce a decision by a majority of the United Nations, against a country accused of breaking the peace, or the direct defense of my country.

A supporting letter from a clergyman indicated that petitioner's beliefs were "primarily related to the war efforts in which our country is now engaged" (G. App. 33), and that he was sincere in those beliefs (*ibid.*). Another supporting letter noted that there was "absolutely no doubt in [the writer's] mind that [petitioner] loves his country and that he would defend it." (G. App. 38). At a personal appearance granted by the local board, petitioner stated, according to the minutes, that "his conscience would not let him fight in Vietnam" and that "he could not honestly say he would not defend his country if it were attacked" (G. App. 44).

The local board concluded that Gillette was "opposed to military service in the case of the Vietnam

War" (*ibid.*), and the district court found a "basis in fact for the board concluding that whatever moral views were held they were directed to the Vietnam war \* \* \* (G. App. 13). In affirming the conviction for failure to report, the court of appeals, *per curiam*, concluded that the "[e]vidence derived from Gillette's selective service file and from his testimony before [District] Judge Wyatt reveals that Gillette's beliefs were based on humanism and were specifically directed against the war in Vietnam." (G. App. 20).

The court of appeals held that petitioner's selective objection did not qualify him for conscientious objector status since, "[e]ven assuming that his views were 'religious' as that word is construed to insure the constitutionality of the Act, the Act requires opposition 'to participation in war in any form'." (G. App. 21).

#### No. 325

Petitioner Negre was inducted into the Army in August 1967. In February 1968, after receiving his basic training, he was ordered to duty in Vietnam. He then filed an application for discharge as a conscientious objector pursuant to Department of Defense Directive 1300.6 and implementing Army regulations.<sup>1</sup> The application was denied, as was his petition in the district court for a writ of habeas corpus.

<sup>1</sup> These regulations prescribe the same standards for determining conscientious objector status as those applied by the Selective Service System pursuant to 50 U.S.C. App. (Supp. V) 456(j) (see *infra* pp. 13-14).

Petitioner, a Catholic, based his application on the basic principle, stated by a Catholic chaplain, that "[e]ach Catholic must form his own conscience in respect of military service. Thus, one Catholic may serve in good conscience, while another Catholic will find that his conscience prohibits military service. Under Catholic religious training and belief, each Catholic has a duty to follow his own conscience in respect of military service" (N. App. 4). His application adopted portions of the Pastoral Constitution of the Church in the Modern World (December 7, 1965)<sup>2</sup> (N. App. 8-9), as follows:

(Sec. 79) But it is one thing to undertake military action for the just defense of the people, and something else again to seek the subjugation of other nations. Nor does the possession of war potential make every military or political use of it lawful. \* \* \*

(Sec. 80) The horror and perversity of war are immensely magnified by the multiplication of scientific weapons. For acts of war involving these weapons can inflict massive and indiscriminate destruction far exceeding the bounds of legitimate defense. \* \* \*

\* \* \* \* \*

Any act of war aimed indiscriminately at the destruction of entire cities or of extensive areas along with their population is a crime against God and man himself. \* \* \*

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<sup>2</sup> Petitioner stated that he accepted "the teaching of his Holiness Pope Paul VI as announced in the Pastoral Constitution as binding upon [his] conscience \* \* \*" (N. App. 10).

The application went on to state that, prior to his induction, petitioner had his "own convictions about the war in Vietnam," but determined that "before making any decision or taking any type of stand on the issue [he] would permit [himself] to see and understand the Army's explanation of its reasons for violence in Vietnam (N. App. 11). Upon completion of his infantry training, he concluded that any contribution to the war in Vietnam would violate his "own concepts of natural law," would "[go] against all that [he] had been taught in [his] religious training," and would be "in contravention of [his] own conscience and [his] moral beliefs" (N. App. 11-12). The application further stated (N. App. 12):

I cannot personally believe that by being in Vietnam we are helping the people there as we say. Have you ever stopped to think all the harm we have brought to that country? We, as being there, are not only destroying their homes, but also are taking the lives of people who were brought up on the very soil who are fighting to preserve their beliefs. We are depriving the individual of the right to live, if we feel he or she is a threat to a village. In Vietnam the individual soldier has the power to kill anyone whom he thinks is wrong.

The application expressed the view that petitioner's duty in the Fort Ord (California) Hospital did not constitute "a direct participation in the war in Vietnam" (N. App. 13) but that petitioner would "refuse duty as a clerk or medical corpsman in Vietnam as [he] would refuse infantry combat duty in Vietnam" (*ibid.*).

He would, however, still be "prepared to perform non-combatant hospital service in the United States because such service is not directly in aid of the Army forces in Vietnam" (N. App. 14). At the end of his application, petitioner added, without any elaboration, that at present he "could not conceive participation in any war." (N. App. 14).

Petitioner was afforded the opportunity to express his beliefs orally at a hearing. The hearing officer found that he was an extremely devout Catholic who sincerely believed that the Vietnam war was wrong (N. App. 38). The officer directed particular attention to petitioner's statements of his conclusions as to the United States' role in Vietnam (*id.* at 38-39):

[Petitioner] is overly concerned with the type of war, not war itself. He is sincerely opposed to violence but it seems that he can in good conscience accept some "types" of war.

\* \* \* \* \*

PFC Negre is of the belief that the Vietnam war is immoral and indiscriminate. He adopts the conclusions of Pope Paul VI [in the pastoral Constitution, relevant portions of which are set out *supra*, p. 6], but makes his own judgment as to what is indiscriminate and what is aggression.<sup>3</sup>

The hearing officer thus recommended that the application for discharge be rejected (N. App. 39) because

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<sup>3</sup> The hearing officer further noted that Negre "stated that he would serve in the United States in a noncombatant status if the United States was attacked. He would not carry a weapon, but he would assist in some other capacity as long as his support was indirect (N. App. 39).

in his opinion "the applicant is objecting to a particular war" (N. App. 39).

The Department of the Army rejected the application for discharge, finding (N. App. 41) that:

Applicant's objection to service [is] based upon a personal moral code which causes him to object to the war in Vietnam specifically and which disqualified him for separation on the grounds of conscientious objection.

Negre then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California.<sup>4</sup> The court denied relief after finding a basis in fact to support the Army's conclusions. The court of appeals affirmed, holding that "[b]eyond question, there was a basis in fact" (N. App. 51) for the conclusions of the Department of the Army. It pointed out (*ibid.*):

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<sup>4</sup>Petitioner Negre is no longer on active duty in the Army, having been transferred to Ready Reserve status. By his own statements, his conscientious views allow him to serve in the military so long as he need not serve in Vietnam, and it was only because he faced Vietnam duty that he sought discharge. His present reserve duty is not in conflict with his expressed views; the possibility that he would ever be reactivated and ordered to Vietnam is highly remote. Under the circumstances, if petitioner were now to file a petition for habeas corpus, for the first time, the matter would lack the ripeness it had when habeas corpus was sought and the petition for a writ of certiorari was filed in this Court. However, as we read *Sibron v. New York*, 392 U.S. 40, and *Carafas v. LaVallee*, 391 U.S. 234, the continuing remote contingency of Vietnam service may prevent the matter from now being considered moot under the circumstances of this case.

[Petitioner] objects to the war in Vietnam, not to all wars. \* \* \* He does not express an objection to the nation's military activities in Korea, Japan, West Germany and other parts of the world. Nor does he object to what he terms non-combatant duty in the Army in the United States. Clearly, his views are completely inconsistent with an objection to "war in any form." \* \* \*

#### SUMMARY OF ARGUMENT

##### I

Section 6(j) of the Military Selective Service Act of 1967 exempts from combatant training and service those persons who by reason of religious training and belief are opposed to war in any form. This provision has been incorporated in regulations promulgated by the various Armed Services to benefit the in-service conscientious objector to all wars who seeks discharge from the military.

The historical evolution of the statutory exemption reflects a clear congressional intent to accommodate only those persons who consider any and all wars as contrary to the principles of their religion—whatever form that religion may take. It was not intended to reach, and has never been construed so broadly as to reach, the individual who conscientiously opposes the particular war of the moment, no matter how sincere his objection or religious his motivation.

##### II

Exemption from military service is not required by the Constitution but is solely a matter of legisla-

tive grace. Congress, in drawing the line between conscientious objectors to all wars and the "selective" objector to a particular war, recognized that the two objections were by nature qualitatively different. It is one thing to frame legislation so as to accommodate individuals whose beliefs, based in religion or the equivalent, categorically forbid killing in war; it is quite another to defer to their varied personal judgments on national policy based on the same political, sociological and economic factors that the government necessarily considered in reaching its decision to wage a particular war. Compelling reasons of general policy support Congress' decision not to follow the latter course. Neither the purpose nor the effect of the legislation runs counter to the constitutional requirements of the Establishment Clause of the First Amendment.

Nor can it reasonably be maintained that, in deciding to require military service of one who might be sent to an area where in conscience he does not believe American troops should be, Congress has violated the Free Exercise Clause of the First Amendment. However untrammelled may be the freedom to believe, religious freedom does not require that religious scruples be recognized as justifying disobedience to a valid law. There are numerous areas in which citizens can state that, as a matter of conscience based in religious principles, they object to political decisions of the government. But that cannot permit such religiously derived views to prevail over national policy and justify non-compliance with the law. Such is the



case here. Only if the Free Exercise Clause is broadened to encompass a general right of conscience to object to and refuse to comply with specific governmental policies could it require exemption of those who, on the basis of some religious motivation, hold a "selective" conscientious objection to participation in a particular war. And so to construe that provision would logically lead to a situation destructive of orderly government, since it would of necessity extend beyond the Selective Service context and reach other governmental policies as to which an individual claimed, as a matter of religious motivation, to be conscientiously opposed.

Plainly, Congress acted within the permissible range of legislative judgment in drawing the line in Section 6(j) on the basis of the qualitative difference between those who assert an unalterable "religious" opposition to killing in any war and those whose scruples against a particular war necessarily depend upon social or political considerations. The classification involved is not irrational, arbitrary or capricious in violation of the equal protection concepts of the Fifth Amendment. While Congress could, of course, determine to draw the line elsewhere, that is a matter for Congress in the exercise of the power, expressly granted it in the Constitution, to raise and support armies.

## ARGUMENT

## I. SELECTIVE CONSCIENTIOUS OBJECTORS DO NOT MEET THE STATUTORY QUALIFICATIONS FOR EXEMPTION OR DISCHARGE FROM SERVICE

Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. V) 456(j)) exempts from "combatant training and service in the armed forces" any person found by his local board to be "by reason of religious training and belief \* \* \* conscientiously opposed to participation in war in any form." Such persons remain subject to the draft but are assigned to noncombatant service, or, if their religious beliefs require, to forms of civilian service outside the armed forces. 50 U.S.C. App. (Supp. V) 456(j).<sup>5</sup>

While this provision has direct application only to claims asserted prior to induction, post-induction claims of conscientious objection to war in any form are provided for in Department of Defense Directive No. 1300.6 (May 10, 1968), which declares:

IV A. *National Policy* \* \* \* [t]he Congress \* \* \* has deemed it more essential to

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<sup>5</sup> Both petitioners in these cases assert, by the nature of their claims (refusal of induction by Gillette, request for discharge by Negre), that their selective conscientious objections entitle them to complete freedom from military service. Gillette's statements in support of his claim to the local board were consistent with such a position (see pp. 3-4, *supra*); Negre's supporting statements may be read as consistent only with a claim for noncombatant service while remaining in the military (see pp. 6-8, *supra*). In our argument we do not distinguish between claims to total exemption and claims for noncombatant (I-A-O) military service, since we believe that a selective objector does not have the kind of conscientious scruples that are prerequisite to either claim.

respect a man's religious beliefs than to force him to serve in the Armed Forces and accordingly has provided that a person having bona fide religious objection to participation in war in any form (I-0 classification) shall not be inducted into the Armed Forces \* \* \*

IV B. *DOD Policy*. Consistent with this national policy, bona fide conscientious objection \* \* \* by persons who are members of the armed forces will be recognized to the extent practicable and equitable. Objection to a particular war will not be recognized.

Pursuant to this mandate, the various branches of the Armed Services have promulgated regulations applicable to in-service objectors which incorporate the statutory exemption of Section 6(j) and the attendant decisional law construing it.<sup>6</sup> In essence, then, it is the construction and validity of Section 6(j) that is at issue in both of the present cases—directly in *Gillette* and by incorporation in *Negre*.

Once again this Court is called upon to examine the legislative history of the exemption provision, this time to ascertain whether Congress intended it to

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<sup>6</sup> DOD Directive No. 1300.6 further states that, "[s]ince it is in the national interest to judge all claims of conscientious objection by the same standards, whether made before or after entering military service, Selective Service System standards used in determining I-0 or I-A-O classification of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering military service." See Army Regulations AR 635-20 (January 1, 1970) and AR 135.25 (June 1, 1969); Navy Department BUPERINST 1900-5 (July 18, 1968); Air Force Regulation AFR 35-24 (March 25, 1969); Marine Corps Order MCO 1306.16B (June 18, 1969); Coast Guard COMDTINST 1900.2 (October 7, 1968).

have application to those conscientiously opposed to participation in only the particular conflict of the moment, or, instead, envisaged its coverage as limited to persons whose "religious" conscientious objection,<sup>7</sup> extends to participation in all wars in any form. The historical evolution of Section 6(j) was traced in detail in the government's brief in *United States v. Seeger*, No. 50, O.T. 1964, pp. 41-60, reprinted in the government's Supplement to its brief in *Welsh v. United States*, No. 76, O.T. 1969, pp. 26A-45A, and we do not repeat it here.<sup>8</sup> It suffices to point out that from the early days of our republic to the present time, the legislative purpose, as stated in a resolution of the Continental Congress in 1775, has been to honor the consciences of those "who from Religious Principles cannot bear Arms in any case." *Selective Service System Monograph No. 11, Conscientious Objection* (1950), pp. 33-34. Never, in all the years in

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<sup>7</sup> We do not view the decisions of this Court in *United States v. Seeger*, 380 U.S. 163, and *Welsh v. United States*, 398 U.S. 333, as reading out of the statute the requirement that a conscientious objection to war must be founded on "religious training and belief." As we read those opinions, while one's beliefs "need not be confined in either source or content to traditional or parochial concepts of religion" (398 U.S. at 339), they still must be "religious" in the registrant's "own scheme of things" (380 U.S. at 185; 398 U.S. at 339). Thus, they must occupy "a place parallel to that filled by \* \* \* God" in traditionally religious persons" and "function as a religion in [the registrant's] life" (380 U.S. at 185; 398 U.S. at 340). It is thus not enough if one's conscientious objection "rests solely upon considerations of policy, pragmatism, or expediency" (398 U.S. at 340-341).

<sup>8</sup> Counsel for both petitioners have been furnished copies of our *Seeger* brief and our *Welsh* supplemental brief.

which Congress has recognized conscientious objection as a basis for exemption from military service has it extended the privilege to persons other than those who were total pacifists—that is, opposed to all forms of war.<sup>9</sup>

In this regard, the language of the present statute is unambiguous. It requires in specific terms a religious conscientious objection to “participation in war in any form.” Petitioners urge that the phrase “in any form” be construed to modify the word “participation” and not the word “war.” Had Congress so intended, however, provision in the same section for possible induction and assignment to “noncombatant service” of persons found to be conscientious objectors would have had little meaning, for such persons, under petitioners’ reading of the statute, would be exempt by definition from any form—combatant or noncombatant—of participation. Moreover, even without regard to the modifying phrase, the meaning of Section 6(j) remains plain, since the term “war” is used in its generic sense, only those who object to “participation in war” are covered. No shuffling of words can alter the thrust of the Act ~~of~~

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<sup>9</sup> We note that while the World War I Act was under consideration, the Senate rejected an amendment which would have granted exemptions “[o]n the ground of a conscientious objection to the undertaking of combatant service in the present war” 55 Cong. Rec. 1474, 1478. Senator LaFollette, the principal proponent of the bill admitted that the intent and effect of his proposal was to excuse those persons of German and Austrian ancestry who had “conscientious objections” against going “into the service to fight against their own kith and kin \*\*\*.” *Id.* at 1476.

having application only to those conscientiously opposed to war generally, in the historical sense of having a religious objection to the concept of bearing arms under any circumstances (see our *Welsh* supplement, *supra*, pp. 26A-34A).<sup>10</sup>

To construe this provision, as petitioners necessarily urge, as an exemption from *all* combatant training for conscientious objectors not unwilling to bear arms generally but opposed to doing so with respect to a particular conflict, stretches the congressional language beyond its breaking point.<sup>11</sup> Ample support for this

<sup>10</sup> In the article by then Dean Stone, *The Conscientious Objector*, 21 Columbia Univ. Q. 253, on which petitioners seem to place considerable reliance, the frame of reference was not the "selective" objector (*id.* at 267). During World War I, the exemption not only had no application to selective objectors, but, indeed, was limited in its coverage to members of historic peace churches. See also the concurring opinion of Mr. Justice Cardozo, joined by Justices Stone and Brandeis, in *Hamilton Regents*, 293 U.S. 245, 265, 266-267.

<sup>11</sup> Petitioner Gillette argues that "[s]ince individuals like Gillette are not being faced with an invasion of the United States or a United Nations sanctioned war or World War II, the fact that their consciences would allow them to fight in these wars should not be sufficient to deny them conscientious objector status with respect to the war they are being faced with, namely the Vietnam War" (Gillette Brief p. 10). However, a person entering military service today is not necessarily "faced with" the Vietnam war. His duty of service potentially may be needed in other places during any given term of service. Thus, the broader inquiry as to a person's feelings about all wars is pertinent and necessary in practical terms, as well as being mandated by the fact that Congress did not intend that a "selective" objector be exempt from combatant or noncombatant training generally because he is opposed to a particular war.

conclusion is found in judicial precedent. With reference to identical language in the Selective Training and Service Act of 1940 (54 Stat. 889), Judge Augustus Hand insisted that a belief sufficient to qualify for conscientious objector status "must *ex vi termini* be a general scruple 'against participation in war in any form' and not merely an objection to participation in the particular war." *United States v. Kauten*, 133 F. 2d 703, 707 (C.A. 2). The interpretation was followed under the Selective Service Act of 1948 (62 Stat. 612), which insofar as heretofore pertinent remained unchanged. *United States v. Spiro*, 384 F. 2d 159 (C.A. 3), certiorari denied, 390 U.S. 956; *Clay v. United States*, 397 F. 2d 901, 919 (C.A. 5), vacated and remanded on other grounds *sub nom. Gioiardo v. United States*, 394 U.S. 310. And it has been applied with equal force to the present statute. See *United States v. Curry*, 410 F. 2d 1297, 1299 (C.A. 1); *United States v. Reeb*, No. 25, 759 (C.A. 9), decided October 27, 1970; and the decisions of the Second and Ninth Circuits in the instant cases.

Moreover, a similar understanding of the scope of Section 6(j) appears from *Si curella v. United States*, 348 U.S. 385, which gave this Court the only occasion it has previously had to pass directly on the meaning of "participation in war in any form." There, the Court concluded that a Jehovah's Witness, who conscientiously opposed participation in all secular wars but admitted to being able to fight in a possible "theocratic war" waged at the command of Jehovah "without carnal weapons" (348 U.S. at 390-391), was entitled to the exemption because (*id.* at 391):

\* \* \* Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets.

As to this "type" of war, it is implicit in the Court's language that a conscientious objection, on religious grounds, must under the terms of the statute be absolute.<sup>12</sup> See also *Taffs v. United States*, 208 F. 2d 329, 331 (C.A. 8), certiorari denied, 347 U.S. 928. Indeed, as recently as last term in *Welsh v. United States*, 398 U.S. 333, this Court, despite differences on other aspects of the challenged provision, was unanimous in expressing the issue under Section 6(j) as opposition to "participating in any war at any time." 398 U.S. at 340, 342; *id.* at 347, 357 (Harlan, J., concurring); *id.* at 369-370 (White, Burger and Stewart, JJ., dissenting). Cf. *Witmer v. United States*, 348 U.S. 375, 381.

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<sup>12</sup> Chief Justice Hughes, dissenting in *United States v. MacIntosh*, 283 U.S. 605, 627, expressed the opinion (*id.* at 635) that an alien conscientiously opposed on religious grounds to bearing arms, either generally or selectively, should not be denied citizenship or the right to hold public office where he is unable for that reason alone to take the oath (Nationality Act of 1940, 54 Stat. 1157) to "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." *Id.* at 630. The rationale, later adopted by the majority of the Court in *Girouard v. United States*, 328 U.S. 61, 64, was simply that "[t]he oath required of aliens does not in terms require that they promise to bear arms," and thus the "[r]efusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions." Though petitioners take comfort in the fact that Chief Justice Hughes did not in



No case relied on by petitioners has interpreted the *statute* otherwise, nor are we aware of any judicial decision which reads into the questioned language an exception for "selective" conscientious objectors. Most of those said to contain dictum suggesting such a construction represent nothing more than a reaffirmation of the *Sicurella* rationale<sup>13</sup> (*United States v. Haughton*, 413 F. 2d 736, 742 (C.A. 9); *United States v. Purvis*, 403 F. 2d 555 (C.A. 2)) or a variant of the settled principle that a willingness to use force in self-defense or in defense of one's home and family is not inconsistent with a conscientious objector claim. *United States v. James*, 417 F. 2d 826, 831 (C.A. 4); *United States v. Carroll*, 398 F. 2d 651, 655 (C.A. 3); and see *Sicurella v. United States*, *supra*, 348 U.S. at 389. Even the few cases granting an exemption despite the objector's acknowledgment that "it was possible" he would fight if the country was invaded (*United States v. Owen*, 415 F. 2d 383, 390 (C.A. 8); *Miller v. Laird*, No. C-70328, AJZ, N.D. Calif., decided April 28, 1970) were careful to emphasize that since the

*MacIntosh* distinguish between total pacifists and "selective" religious objectors in concluding that alien conscientious objectors can qualify for citizenship and for public office (*id.* at 635), that has little bearing on the present case. There the question was whether a person unwilling to bear arms in what he considered to be an "unjust" war could, *under the language of the loyalty oath*, still qualify for citizenship or public office; it was not whether such persons could also qualify for an exemption from "combatant training and service" under statutory language requiring a religious conscientious objection to "participation in war in any form." As to the latter, Chief Justice Hughes was careful to express no opinion.

<sup>13</sup> See cases cited at p. 27, n. 4 of petitioner Gillette's brief.

claimant was *then* conscientiously "opposed to participation in all war," his claim should not be denied because of a statement which "relates to a contingency and provides no inference to [his] state of mind when the incident occurred."<sup>14</sup> 415 F. 2d at 390; and see *Miller v. Laird, supra*.

On this background, the relevant language of Section 6(j) (and hence of the military regulations governing Negre's request for discharge) lends itself to but one interpretation—that exempt status depends on a "religious" conscientious objection to participation in any shooting war in any form. Since Congress has determined so to circumscribe the exemption, it remains only for this Court to ascertain whether that legislative judgment runs afoul of some constitutional command. Notwithstanding recent district court decisions to the contrary (*United States v. Sisson*, 297 F. Supp. 902 (D. Mass.), appeal dismissed for lack of jurisdiction, 399 U.S. 267; *United States v. McFadden*, 369 F. Supp. 502 (N.D. Cal.), pending on jurisdictional statement, No. 422, this Term, *United States v. Bowen*, Cr. No. 42499, N.D. Cal., decided December 24, 1969), we submit that it does not.

<sup>14</sup>In *Fleming v. United States*, 344 F. 2d 912 (C.A. 10), while the registrant apparently possessed what could be characterized as "selective" views, the court considered him "to be conscientiously opposed to participation in war in any form" (*id.* at 916) and thus did not focus on this aspect of the case. Rather, the issue turned on whether Fleming's opposition was motivated "by reason of religious training and belief" within the meaning of *Seeger*.

## II. A SELECTIVE CONSCIENTIOUS OBJECTOR HAS NO CONSTITUTIONAL RIGHT TO EXEMPTION FROM COMBATANT SERVICE IN VIETNAM

Under the Constitution, the authority to determine whether or not this country needs a particular individual's services in the Armed Forces is vested in the Congress. See *United States v. O'Brien*, 391 U.S. 367, 377; *Lichter v. United States*, 334 U.S. 742, 755-758. In exercising its broad grant of power "[t]o raise and support Armies" (Art. I, Sec. 8), Congress may lawfully conscript for military service either in time of peace or war. *United States v. O'Brien*, 391 U.S. 367, 377; *Selective Draft Law Cases*, 245 U.S. 366. To be sure, Congress may not act in a way which impairs religious freedom or establishes a religion in violation of the First Amendment; nor may it arbitrarily discriminate between persons or classes in violation of the due process clause of the Fifth Amendment. But Congress has done neither in limiting the scope of Section 6(j) to those opposed to war "in any form".

Religious freedom does not require that religious scruples be recognized as justifying disobedience to a valid law. *Cantwell v. Connecticut*, 310 U.S. 296, 303; *Jacobson v. Massachusetts*, 197 U.S. 11, 29; *Prince v. Massachusetts*, 321 U.S. 158. And, as we shall show, neither the principles of religious neutrality, nor those of equal protection more generally, invalidate the congressional decision to excuse only those who are opposed to participation in war in any form (50 U.S.C. App. (Supp. V) 456(j)). Because the Constitution requires no exemption at all (*In re*

*Sommers*, 325 U.S. 561),<sup>15</sup> it is apparent, as expressly noted by this Court in *Hamilton v. Regents*, 293 U.S. 245, 264, quoting with approval from *United States v. MacIntosh*, 283 U.S. 605, 623-624, that:

The conscientious objector is relieved from the obligation to bear arms \* \* \* only because, it has accorded with the policy of Congress thus to relieve him. \* \* \* The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress. \* \* \* [T]he war powers \* \* \* include \* \* \* the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general.\* \* \*

## A

In granting the exemption only to those opposed to war generally, Congress sought to accommodate, rather than to establish, religion. It chose to recognize that group of persons who for reasons of conscience reject killing as an instrument of national policy for all situations, and, in deference to their religious beliefs, to spare them the hardship that would result if they were required to perform military service. The scope of Section 6(j) was as recently as last term, in *Welsh v. United States*, 398 U.S.

<sup>15</sup> As Mr. Justice Harlan stated in his separate opinion in *Welsh v. United States*, *supra*, 398 U.S. at 356, "Congress, of course, could entirely consistently with the requirements of the Constitution, eliminate *all* exemptions for conscientious objectors."

333, construed by this Court in just such a way as to meet the "benevolent neutrality" standard of the First Amendment (*Walz v. Tax Commission*, 397 U.S. 664, 669). As a consequence, all persons who are in a broad sense "religiously" opposed to war in any form are entitled to the exemption, whether their views be a matter of church doctrine, nontheistic religious teaching or individual conscience independently developed. No religion is favored; none is discriminated against; none is established.

That Congress drew the line between the conscientious objector to all wars and the "selective" objector to a particular war in no way suggests a religious preference. The underlying purpose of the legislative decision, to which we must look (*Abington School District v. Schempp*, 374 U.S. 203, 222), is to recognize a qualitative difference between general and selective objection without regard to religion.<sup>16</sup> Opposition to a particular war necessarily involves a political judgment,<sup>17</sup> an individual conclusion that the policy

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<sup>16</sup> Since Congress has chosen to make no distinction between religious and non-religious "selective" conscientious objectors, denying exemption to both, it has avoided the question that would arise under the Establishment Clause if Section 6(j) were read to include "religious" selective objectors, but did not include non-religious selective objectors. See *Welsh v. United States*, *supra*, 398 U.S. at 356-361 (Harlan, J., concurring). That problem is, however, suggested by Negre's Brief in No. 325, insofar as it argues that he is entitled to special treatment on account of a Catholic "unjust war" precept.

<sup>17</sup> See generally, Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 Va. L. Rev. 1355, 1374-1376 (1968).

adopted by the duly elected government is wrong at a certain time in relation to a particular area of operations. See *United States v. Kauten*, *supra*, 133 F. 2d at 707. While the personal response to that determination may well be religiously and conscientiously motivated, it rests in the first instance on a decision that is political and particular. See generally, Comment, 34 U. Chi. L. Rev. 79, 102 (1966).<sup>18</sup> In contrast, those who conscientiously oppose participation in combat in any form do not invoke the same type of contemporary political judgment. Their actions are not motivated by weighing the objectives of a governmental decision to wage war, nor by determining independently whether a war is just or unjust, the enemy good or bad. Their rejection of war in any form is on a different level; it is based, rather, on inherent general characteristics of military combat, on the cardinal moral tenet that it is wrong to kill for any purpose at any time.<sup>19</sup>

It is one thing to frame legislation so as to accommodate individuals whose beliefs, based on religion or the equivalent, categorically forbid killing in war; it is quite another to defer to their varied personal

<sup>18</sup> Thus, for example, Negre's objection to the Vietnam war, though said to be derived from religious doctrine, depends upon "his own judgment as to \* \* \* what is aggression" (p. 8, *supra*; Negre Brief p. 11); and Gillette's objection is to "this unnecessary and unjust war" (p. 4, *supra*).

<sup>19</sup> This, of course, recognizes the fact that belief in the use of self-defense, as well as defense of home, family and associates is not inconsistent with a conscientious objection to war in any form. See *supra*, p. 20; and see *Sicurella v. United States*, *supra*, 348 U.S. at 391.

judgments on national policy based on the same political, sociological and economic factors that the government necessarily considered in reaching its decision to wage a particular war. See generally, Comment, 34 U. Chi. L. Rev. 79, 102, (1966). Without regard to the source of such a selective objection—whether religious in a narrow or broad sense or otherwise—there are compelling reasons of general policy for not establishing such an exemption from military service. Most fundamentally, any such exemption—based as it would necessarily be upon changeable political judgments of the moment—would be inconsistent with the concept of uniform, and hence fair, principles of exemption. Assuming (as we do in these cases) the sincerity of the particular individual's feelings, there would remain real problems in defining just what kind of selective objection is sufficient to warrant exemption either from all service or from combatant service. Unlike the statement "I cannot in conscience participate in any war", the statement "I cannot in conscience participate in this war" has no fixed meaning and can reflect a changeable spectrum of subjective feelings. For example, the individual may object to what he conceives to be the underlying "purpose" of the United States' combat operations in Vietnam, but that "purpose" may or may not have changed over the years; would such an objection properly justify a refusal to participate in the process of withdrawal from Vietnam? Or the individual may object not to the "purpose" but rather to the use of particular weapons or techniques, or

to the political coloration of the United States' allies. The range of possible views is broad, and both the matters to which the individual may object and his attitude toward them are subject to change from day to day. The further question would arise as to the circumstances under which a selective objection would warrant a complete exemption from military service rather than simply assignment to noncombatant duties or, perhaps, to a noncombat zone;<sup>20</sup> again, the problem would be much more intricate than in the case of the categorical objector, as to whom the alternatives are simply (1) whether his objections are only to personal participation in any war, or (2) whether they categorically forbid any service in support of the military.

Unless the Selective Service System and the military are to be required to defer to any individual's unexplained assertion (on sincere "religious" grounds) that he chooses not to serve at all at the present time or that he chooses not to enter combat, we cannot see how exemptions for selective objectors could be administered uniformly and fairly without exploration, in each case, into the matters we have

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<sup>20</sup> Does the First Amendment contain a right, as petitioner Negre claims, to be discharged from the service merely because he opposes combat service in Vietnam, even though he could apparently in good conscience continue to serve in the army? Can petitioner Gillette validly assert his objection to the fighting in Vietnam as a defense to a refusal to submit to induction generally, when his duty may never involve Vietnam service?



suggested.<sup>21</sup> Such inquiries would inevitably be vexatious if not impossible to conduct with any hope of reaching fair and consistent results in each case. And apart from these more fundamental concerns, the purely administrative problems and delays that would arise would necessarily hinder the achievement of the basic objective of the Selective Service System—to raise necessary military manpower for the national defense (cf. *Falbo v. United States*, 320 U.S. 549, 553; *Estep v. United States*, 327 U.S. 114, 137 (Frankfurter, J., concurring); *Oestereich v. Selective Service Board*, 393 U.S. 233, 241 (Harlan, J. concurring); *Clark v. Gabriel*, 393 U.S. 256, 258–259).

These considerations, all secular rather than religious, (see *Abington School District v. Schempp*, 374 U.S. 203, 222; *Board of Education v. Allen*, 392 U.S. 236, 243), provide ample basis for the legislative judgment to excuse only those persons whose beliefs cause them to oppose participation in all wars and not those persons who assert the right to choose the war in which they will fight. Petitioners have failed to show, as they cannot, an “absence of any substantial legislative purpose other than a religious one” for so

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<sup>21</sup> These difficulties would, of course, be added to the difficulties we have already suggested of determining in each case whether one seeking an exemption on grounds of a “selective” objection to a particular war sincerely reached his political judgment that the war is unjust for reasons that are religiously motivated (however broadly “religion” is defined) rather than based *solely* on political, sociological and economic considerations. See generally Smith and Bell, *The Conscientious-Objector Program—A Search for Sincerity*, 19 U. Pitt. L. Rev. 695 (1958).

delineating the exemption. *McGowan v. Maryland*, 366 U.S. 420, 468 (Frankfurter, J., concurring). There is, of course, as Mr. Justice Brennan pointed out in his separate opinion in *Schempp, supra*, 374 U.S. at 295, "nothing in the Establishment Clause [that] forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs." Congress has sought to do no more here; "[t]he constitutional [obligation of] neutrality \* \* \* 'is not so narrow a channel' " that it will not accommodate a legislative judgment based upon the qualitative difference between general and selective conscientious objections that is clearly definable without discrimination among or even reference to matters of religious belief. *Walz v. Tax Commission*, 397 U.S. 664, 669.

## B

Nor can it reasonably be maintained that, in deciding to require service of one who might be sent to an area where in conscience he does not believe American troops should be, Congress has violated the Free Exercise Clause of the First Amendment. As already pointed out, there is no constitutional right to exemption from military service; that right is accorded to those who conscientiously object to all wars solely as a matter of legislative grace. See *Welsh v. United States, supra*, 398 U.S. at 356 (Harlan, J., concurring). In his separate opinion in *Hamilton v. Regents*, 293 U.S. 245, 268, Mr. Justice Cardozo, joined by Justices Stone and Brandeis, recognized that extreme

deference to a conscientious objector's claim of religious liberty might well lead to wholly incongruous situations:

Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end, to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

Most religions (and their humanistic equivalents) recognize that there are areas in which individual conscience governs the application of religious (or humanistic) doctrine to particular circumstances. Accordingly, there are numerous areas in which citizens can state that, as a matter of conscience based in religious principles, they object to political decisions of the government, just as petitioners do here.<sup>22</sup> But

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<sup>22</sup> The Catholic religion, for one, teaches that conscience in representing God has more right to be obeyed than any law contrary to conscience (Pope John XXIII, *Pacem in Terris*, page 142a, April 11, 1963): "Since the right to command is required by moral order and has its source in God, it follows that, if civil authorities legislate for or allow anything that is contrary to that order and therefore contrary to the will of God, neither the laws made nor the unauthorizations granted can be binding on the consciences of the citizens of US, since God has more rights to be obeyed than man" (N. App. 9-10). Nor is such

that cannot permit such religiously derived views to prevail over national policy and justify non-compliance with the law. Moral conviction derived from political judgment may well justify civil disobedience in the mind of the lawbreaker, but it is not a valid defense to breaking the law. And this must be true whether or not the law thought to be unjust requires an affirmative act. Compare *United States v. McFadden, supra*; *United States v. Bowen, supra*. A person cannot lawfully refuse to pay taxes because he conscientiously believes it is wrong or irreligious to contribute to an unjust war. Nor can he escape affirmative registration requirements of the Selective Service System because they are not consonant with his religious conscientious objector belief. See *United States v. Henderson*, 180 F. 2d 711, 713-716 (C.A. 7).

Only if the Free Exercise Clause is broadened to encompass a general right of conscience to object to and refuse to comply with specific governmental policies could it require the inclusion of those who, on the basis of some "religious" motivation, hold a "selec-

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belief in freedom of conscience confined to Catholicism. It applies with equal force both to theistic and nontheistic religions. See generally *amicus* briefs submitted by representatives of the following religions: Baptist, Jewish, Lutheran, Presbyterian, Quaker, American Ethical Union, Church of the Brethren, Disciples of Christ, United Church of Christ, Reformed Church in America, and also the interdenominational National Council of Churches. There are strong suggestions in the briefs that the role ascribed to individual conscience by the various religions are quite similar. There is also some suggestion that religions other than Catholicism also recognize a distinction among wars.

tive" conscientious objection to participation in a particular war.<sup>23</sup> And if that provision is given such a sweeping scope, it would of necessity extend beyond the Selective Service context and reach untold other governmental policies as to which an individual claimed, as a matter of religious motivation, to be conscientiously opposed. Such a construction of the First Amendment would be destructive of the orderly functioning of government and would undermine the essential integrity of the democratic process.

Thus, if the legislative determination that the "selective" objector must serve in the military be deemed to impinge on the free exercise of his "religious" beliefs, it is a permissible intrusion under the standards enunciated by this Court in *Sherbert v. Verner*, 374 U.S. 398, 406-407.<sup>24</sup> The compelling interest that warrants any such intrusion is not merely one of administrative convenience or the need for some degree of certainty in providing necessary military manpower, though these, of course, are relevant and important considerations to our national security. See generally, Clark, *Guidelines For the Free Exer-*

<sup>23</sup> Language purporting to protect a general "right of conscience" was in fact included in early drafts of the Bill of Rights, but was eliminated from the provisions finally adopted and submitted to the States for ratification. See Russell, *Development of Conscientious Objector Recognition in the United States*, 20 Geo. Wash. L. Rev. 409, 416-417 (1952).

<sup>24</sup> We note further that there is not here any such discrimination among religions as the Court adverted to in *Sherbert* in noting that South Carolina law made specific provision for Sunday worshippers as distinguished for Sabbatarians (374 U.S. at 406). See pp. 33-34 *infra*.

cise Clause, 83 Harv. L. Rev. 327, 330-336, 349. Nor is it limited to the interest in uniform, and hence fair, administration of the draft laws. Congress also has a responsibility to preserve the governmental integrity by not allowing political dissent, no matter how sincerely and religiously motivated, to excuse a person from the duties lawfully imposed by the government on all persons in the same class. In achieving this end by limiting the draft exemption to those opposed to "war in any form," Congress has successfully "chart[ed] a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." *Walz v. Tax Commissioner, supra*, 397 U.S. at 672.<sup>25</sup>

c

What we have already said adequately answers the further contention that the legislative distinction between categorical and selective conscientious objectors amounts to arbitrary or invidious discrimination in violation of the equal protection concepts of the Fifth Amendment. Plainly, Congress was within the permissible range of legislative judgment in drawing the line on the basis of the qualitative difference between those who assert an unalterable "religious" opposition to killing in any war and those whose scruples against a particular war necessarily depend, as we

<sup>25</sup> This Court recognized in *Walz*, 397 U.S. at 673, that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the non-interference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself."

have shown, upon social or political considerations of the moment. Congress could, of course, determine to draw the line as petitioners suggest, but that is a matter for Congress in the exercise of the power, expressly granted it in the Constitution, to raise and support armies.<sup>26</sup>

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<sup>26</sup> The majority of the National Advisory Commission on Selective Service in its suggestions to the President voted to "retain the present requirement of the statute, that conscientious objection must be based on moral opposition to war in all forms." (Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* p. 50 (1967). The majority concluded (*ibid.*): "[T]he status of conscientious objection can properly be applied only to those who are opposed to all killing of human beings under any circumstances. It is one thing to deal in law with a person who believes he is responding to a moral imperative outside of himself when he opposes all killing. It is another to accord a special status to a person who believes there is a moral imperative which tells him he can kill under some circumstances and not kill under others." The Commission majority was of the opinion that "so-called selective pacifism is essentially a political question of support or non-support of a war and cannot be judged in terms of special moral imperatives. Political opposition to a particular war should be expressed through recognized democratic processes and should claim no special right of exemption from democratic decisions" (*ibid.*). The majority also expressed concern that "legal recognition of selective pacifism could open the doors to a general theory of selective disobedience to law, which could quickly tear down the fabric of government; the distinction is dim between a person conscientiously opposed to participation in a particular war and one conscientiously opposed to payment of a particular tax." (*ibid.*) The majority concluded also "that a legal recognition of selective pacifism could be disruptive to the morale and effectiveness of the Armed Forces. A determination of the justness or unjustness of any war could only be made within the context of that war itself. Forcing upon the

## CONCLUSION

For the reasons stated, the judgment of conviction in No. 85, and the denial of the petition for habeas corpus in No. 325, should be affirmed.

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NOVEMBER 1970.

individual the necessity of making that distinction—which would be the practical effect of taking away the Government's obligation of making it for him—could put a burden heretofore unknown on the man in uniform and even on the brink of combat, with results that could well be disastrous to him, to his unit and to the entire military tradition. No such problem arises for the conscientious objector, even in uniform, who bases his moral stand on killing in all forms, simply because he is never trained for nor assigned to combat duty" (*id.* at pp. 50-51).



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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1970

**No. 325**

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LOUIS A. NEGRE,

*Petitioner,*

—against—

STANLEY R. LARSEN, *et al.*,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRIEF OF LIEUTENANT LOUIS P. FONT,  
AMICUS CURIAE**

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FOR THE NINTH CIRCUIT

---

**BRIEF OF LIEUTENANT LOUIS P. FONT,  
AMICUS CURIAE**

---

**Interest of the Amicus**

This brief is submitted with the consent of the petitioner and of the respondent.\*

Amicus is a First Lieutenant in the United States Army. He is the plaintiff-appellant in the case of *Font v. Laird*, which is presently pending in the Court of Appeals for the Fourth Circuit, on appeal from a decision by the United States District Court for the District of Maryland. In the

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\* Letters of consent from the Solicitor General and the attorney for the petitioner have been filed with the Clerk.

latter decision, the District Court, Hon. Alexander Harvey, II, U.S.D.J., rendered an opinion denying a petition for a writ of habeas corpus, by which Lieutenant Font sought review of the Army's decision refusing to discharge him as a "selective" conscientious objector. — F. Supp. —, Civ. No. 70-716H (D. Md. July 24, 1970).

Lieutenant Font's interest as *amicus curiae* in this case stems from the fact that any decision by this Court may seriously, if not conclusively, affect the outcome of his case.

This brief seeks to present little additional legal argument beyond that which has already been presented by the petitioners in the present case and in the companion case of *Gillette v. United States*, No. 85, October Term, 1970. Rather, it is felt that it may be helpful to the Court to have before it, in ruling on questions of selective conscientious objection, the factual record of Lieutenant Font's long personal history of very active, traditional religious involvement, religious training, and religious belief, which has resulted in his claim of selective conscientious objection.

It is with these considerations in mind that this brief is respectfully submitted.

### **Statement of the Case**

*Amicus* is a 1968 graduate of the United States Military Academy at West Point. Lt. Font entered West Point in 1964, and in the ensuing four years at that institution he compiled a most favorable record in all areas, receiving numerous honors and finishing as a Distinguished Graduate in the top 5% of his class, ranking 31st in a class of 706 members. This ranking included both military aptitude and physical education, as well as academic achievements.

Because of his excellent record, amicus was selected as one of the nine cadets to represent West Point in the Rhodes Scholarship competition. Among his other honors, as a junior, in August, 1966, he was chosen to represent the United States Military Academy in an exchange program with the Mexican Military Academy in Mexico City, Mexico. In September of 1967 he was selected as one of four cadets to represent the United States and the Military Academy in Santiago, Chile, in military ceremonies in that country. Lt. Font served during his senior year as Adjutant of a Cadet Battalion. Moreover, he was one of the few cadets whose record contained not a single instance of exceeding the allowed number of demerits in any month.

Following his graduation from the Academy in June of 1968, the Academy and the Army, on the basis of Lt. Font's outstanding record, endorsed him to attend graduate school, and he was accepted at Harvard University for two years of study at the John F. Kennedy School of Government, leading to a Master of Arts degree in Public Administration. This course of study commenced in the autumn of 1968 and was to terminate in June of 1970. During his period of study at Harvard, however, amicus gradually came to the realization that, like petitioner Louis Negre, he was compelled by his most deeply felt conscientious beliefs to seek discharge from the Army as an objector to participation in the Vietnam War in any form. Consequently, after a period of the most careful reflection, he submitted on February 27, 1970, an application for discharge from the Army as a conscious objector pursuant to the provisions of Army Regulation 635-20 (hereinafter AR 635-20), the regulation which establishes the procedures for dealing with conscientious objectors who are members of the Army.

Excerpts from amicus' application, and relevant supporting papers, are attached as Appendix "A" of this brief.

The essence of Lt. Font's claim of conscientious objection was set forth in the following excerpts from his aforementioned application:

"The underlying premise of my religious beliefs is that human life is of value, of high value, of sacred value. Life is precious and is to be cherished and respected. Life is a divine spark, a gift of God that knows no color or creed, like love. Snuffing out a divine spark—taking the life of another human being even in the hope of saving others, even in a just war—is, at best, of marginal morality. My religious beliefs compel me to believe that the gross and indiscriminate level of violence applied in Vietnam tips the moral balance strongly on the side of the immoral, of unjustness, and therefore the taking of any life in Vietnam, or contributing to that effort, is impossible for me. To me, the Commandment 'Thou shalt not kill' at a very minimum points to the inherent sanctity and worth of life. If my Methodist upbringing and belief means anything at all, it certainly means—it *must* mean—that a person's life is of value.

The Golden Rule, 'Do unto others as you would have them do unto you,' compels me to view the Vietnam war from the standpoint of the victim, the Vietnamese peasant and the American soldier. I am convinced that it makes no difference whatsoever to the Vietnamese who looks up into the sky and sees silver napalm canisters tumble down toward him, whether the napalm falls because the United States government loves him or hates him or is liberating him or pacifying him. The

point is that the bombs fall and the human being is dead—and with him a trace of mankind and humanity. In the words of John Donne, the English poet, 'No man is an Island, entire of itself; every man is a piece of the continent, a part of the main . . . any man's death diminishes me, because I am involved in mankind . . .'

It is only after long and careful study, meditation, and prayer with my God that I have come to these conclusions. I have had to ask myself some difficult and grueling questions: Given that I regard the Vietnam war as immoral, can I, should I accept assignment to Vietnam, even if to sit behind a desk in Saigon? Could I perform my job with the initiative and high performance expected of a West Point graduate? Does a moral man, whose religious beliefs compel him to find the Vietnam war immoral, remain in the Armed Forces that wages that war? Where do my loyalties lie when there exists a clear conflict between my duty to God and my duty to my country?

Over the last several months I have sought answers to these questions in religious readings and other books, in discussions with my friends, in discussions with theologians, but always, in the sound of silence the questions return to gnaw at my conscience. When I consider this ordeal, the words of the Greek poet, Aeschylus, seem appropriate:

Even in our sleep, pain  
which cannot forget,  
falls drop by drop upon the heart until,  
in our despair, against our will,  
comes wisdom through the  
aweful grace of God.

My 'wisdom,' my irrevocable and undebatable conclusion, my deepest emotions founded on my religious belief, compel me to reject participation in the Vietnam war as immoral . . . I feel this with my whole being. I feel this with the same sort of total awareness that compelled John Wesley, the founder of Methodism, to separate himself from the Anglican Church on grounds of conscience. To be able to live with myself and others, I must file this claim. The following passage from Luke, ch.6, v.49, illuminates my position: 'But he that heareth, and doeth not, is like a man that without a foundation built a house on the earth; against which the stream did beat vehemently, and immediately it fell; and the ruin of that house was great.' Were I to do nothing, or were I to allow my conscience to be violated, I would no longer be of any value to myself or to the country that I cherish" (A. 6-8).

The sources of amicus' conscientious objection, as set forth in his application, are many and varied. He was raised in a devout Methodist home and his father is a lay preacher in the Methodist Church. As a youth in Kansas City, Missouri, amicus was active in Methodist Church activities, serving as president of the local Methodist Youth Fellowship (A. 14-15). As a Boy Scout he won many honors, including the God and Country Award (A. 16). Of primary importance to his beliefs are the principles imparted to him as a West Point cadet which were embodied in the West Point prayer:

"O God, our Father, Thou Searcher of Men's Hearts, help us draw near to Thee in sincerity and truth. May our religion be filled with gladness and may our worship of Thee be natural.



Strengthen and increase our admiration for honest dealing and clean thinking, and suffer not our hatred of hypocrisy and pretense ever to diminish. Encourage us in our endeavor to live above the common level of life. Make us to choose the harder right instead of the easier wrong, and never to be content with a half truth when the whole can be won. Endow us with courage that is born of loyalty to all that is noble and worthy, that scorns to compromise with vice and injustice and knows no fear when truth and right are in jeopardy. Guard us against flippancy and irreverence in the sacred things of life. Grant us new ties of friendship and new opportunities of service. Kindle our hearts in fellowship with those of a cheerful countenance, and soften our hearts with sympathy for those who sorrow and suffer. Help us to maintain the honor of the Corps untarnished and unsullied and to show forth in our lives the ideals of West Point in doing our duty to Thee and to our Country. All of which we ask in the name of the Great Friend and Master of men. Amen" (A. 11-12).

Annexed to Lt. Font's conscientious objector application were numerous letters from theologians, clergymen and military officers who attested to the deeply religious nature of his conscientious objector beliefs and to his sincerity in professing these convictions. Among the eminent and highly respected theologians and clergymen who wrote letters in Lt. Font's support were Dr. John M. Swomley, Jr., Professor of Christian Ethics at St. Paul's School of Theology, Kansas City, Missouri; Dr. Paul Deats, Jr., Professor of Social Ethics at Boston University School of Theology; Dr. Charles C. Price, Preacher to the University

of Harvard; Dr. Robert H. Hamill, Dean of the Chapel of Boston University; Dr. Elmer Brown, a Quaker Minister in Cambridge, Mass.; and Rabbi Herman Pollack, Adviser to the Hillel Society at Massachusetts Institute of Technology.

Representative of the letters written by these distinguished religious leaders is that of Dr. Swomley, who has counselled many hundreds of young men concerning conscientious objection and who stated that he was most impressed by Lt. Font's "earnest sincerity"; he wrote further that, of the many men he has seen regarding conscientious objection, "[N]one have seemed to me to arrive at a position of conscientious objection more honestly and with a greater sense of all that is involved" (A. 28).

Of the military personnel writing in amicus' behalf, Major C. P. Hutton, on active duty in Vietnam as Assistant Chief of Staff of an armored infantry division, wrote that while he does not agree with Font's beliefs, "I am certain his convictions are sincere," and recommended that the application be approved (A. 33).

Air Force Major James R. Murphy, Headquarters United States European Command, a former instructor of amicus at West Point, wrote:

"I had no doubts concerning the personal sincerity of his convictions, the loftiness of his ideals, the intellectual prowess by which he arrived at his conclusions, and the moral rectitude of his character" (A. 30-31).

Subsequent to the filing of his application amicus was summarily removed from his assignment at Harvard University and ordered to report for new permanent assignment to the Deputy Adjutant General at First Army Head-

quarters, Fort George G. Meade, Maryland. Amicus continued to be stationed at Fort Meade during the processing of his application.

On March 18, 1970, pursuant to AR 635-20, ¶4c, Lt. Font was interviewed by an Army psychiatrist, who specifically found that he was sincere in presenting his conscientious convictions. Pursuant to the same regulation he was also interviewed by Major Billy M. Whiteside, a Methodist chaplain, on March 18 and March 20, 1970. Chaplain Whiteside submitted a recommendation evincing the strongest belief in the profound depth and religious character of amicus' beliefs, stating in part as follows:

"a. I, personally, find no basis on which to question nor doubt the sincerity of Lieutenant Font in his convictions regarding his course of action.

b. It is quite evident that the primary source of his convictions is religious and his interpretation of Christian principles and ideals are in keeping with the fundamental teachings he received in his home and church while growing up.

c. I was deeply impressed with his sincerity and the analytical formulation of his conclusion."

On April 14, 1970, pursuant to AR 635-20, ¶4d, a hearing on the application for discharge was held at Fort Meade, Maryland, before Major Donald E. Cukjati, who received extensive testimony under oath both from Lt. Font and from a number of witnesses, all of whom repeated in the strongest terms their unqualified belief in Lt. Font's sincerity. Major Cukjati submitted his recommendation on April 22, 1970, finding Lt. Font to be unquestionably sincere

in his beliefs but recommending disapproval of the application "since selective conscientious objection is not authorized under the provisions of paragraph 3b(4), AR 635-20."

On April 22, 1970, Lt. Font's conscientious objector application together with all of the recommendations referred to above, was forwarded to the Department of the Army in Washington, D. C. by Col. H. J. Webb. Col. Webb, acting for Gen. Jonathan O. Seaman, Commanding General of the First United States Army, Ft. George G. Meade, recommended disapproval of the application because selective conscientious objection is barred by ¶3b(4), AR 635-20.

On June 12, 1970, amicus received notification that his application for discharge as a conscientious objector had been disapproved. The reasons stated for the disapproval by the Army review board were as follows:

"The applicant lacks the depth of sincerity to qualify for discharge as a conscientious objector under the provisions of AR 635-20. Further, the applicant's claim is based on objection to a particular war. Paragraph 3b(4) AR 635-20."

At the same time amicus received orders to report to Ft. Benning, Georgia, on June 18, 1970, for Officers Training Course, a combat preparatory assignment; orders were also issued for him to report to the 176th Replacement Company, APO San Francisco, on September 28, 1970, for shipment to Southeast Asia.

For the reasons set forth above, Lt. Font determined that the order directing him to report to Ft. Benning and the order directing him to report for shipment to Southeast Asia, or any similar order, would be in direct and serious

conflict with his most deeply held conscientious convictions. Therefore, on June 16, 1970, Lt. Font petitioned the United States District Court for the District of Maryland for a writ of habeas corpus to review the Army's denial of his petition for discharge and further seeking an order restraining and enjoining the military authorities from attempting to enforce the above mentioned orders, from taking any other action inconsistent with his religious and conscientious beliefs pending the determination of his petition for habeas corpus, or from instituting court martial or any other disciplinary proceedings against him for refusing to perform duties relating to combat or combat preparation during the pendency of the litigation.

On July 24, 1970, subsequent to a hearing on the merits of amicus' petition, the District Court, Hon. Alexander Harvey, II, U.S.D.J., rendered a decision specifically finding that there was no basis in fact for the board's assertion that Font's beliefs were not sincerely held. *Font v. Laird*, — F. Supp. —, Civ. No. 70-716H (D. Md. July 24, 1970). (Slipsheet opinion, p. 7.) However, the District Court declined to grant the writ of habeas corpus, holding that there was neither a statutory nor a constitutional requirement that the beliefs of selective conscientious objectors be recognized. The decision of the District Court is presently being appealed by Lt. Font to the Court of Appeals for the Fourth Circuit. During the pendency of the appeal, the order of the District Court restraining the military authorities from taking any actions inconsistent with amicus' beliefs was expressly continued in effect.

Lt. Font presently continues to be stationed at First Army Headquarters at Ft. George G. Meade, Maryland,

where he has had various assignments. His current assignment is as a housing inspection officer.

Amicus fears that, should this Court fail to recognize the beliefs of selective conscientious objectors such as Louis Negre and himself, he may be given an order which is in irreconcilable conflict with his conscience, and he may consequently be subjected to immediate court martial or other military discipline.

It is because of such serious adverse consequences which may devolve upon amicus, should the Court here affirm the decisions of the Second and Ninth Circuits below, that Lt. Font has obtained the consent of the parties in this case to offer this brief as a friend of the Court.

### Summary of Argument

Amicus believes that a proper construction of Section 6(j) of the Military Selective Service Act of 1967 would find that the statute does not support the Army's attempt to refuse discharge to those whose consciences compel objection only to particular wars.

Amicus concurs in and supports the arguments presented by petitioner and the other *amicus curiae* in this case and the companion case of *Gillette v. United States*, No. 85, this Term, and argues in addition that even the Regulations drawn by the Selective Service authorities themselves, pursuant to the statute, appear to support the construction for which we contend.

Alternatively, amicus believes that if the statute and regulation are not so construed, they must be found to be in violation of constitutional requirements in at least three

respects: they operate as an establishment of religion, and as an abridgement of the free exercise of religion, both in violation of the First Amendment; and they also operate to bring about a failure of equal protection of the laws, in violation of the due process clause of the Fifth Amendment. Amicus believes that the facts of his own case make it incontrovertibly clear that present policies toward those who object to participation only in particular wars constitute religious discrimination.

## ARGUMENT

### I.

**Section 6(j) of the Military Selective Service Act, properly construed, requires recognition of selective conscientious objection. Limiting language in the Department of Defense directive and the Army Regulation finds no support in the statute or the legislative history.**

While fully concurring in and supporting the arguments set out in the briefs of petitioner and of the other *amici curiae*, we would also wish to bring to the attention of this Court the fact that the Selective Service administrators themselves, in drafting regulations pursuant to the Selective Training and Service Act of 1940 (54 Stat. 885), which contained language almost identical to that of the present Military Selective Service Act, 50 U.S.C. App. §456(j), appear to have placed on that language the same construction for which petitioner here contends.

Thus, in providing for the treatment of registrants who have been classified as I-A-O, those whose objection will not permit them to engage in actual killing but will permit

them to serve in noncombatant status, no mention is made of the words "in any form," for the I-A-O registrant's objection does not extend to "any form" of participation, but only to *some* forms of participation. 32 C.F.R. §1622.11.

Those who are classified in class I-O, on the other hand, are those who find that their consciences do not permit them to serve in the armed forces in any way, and they are to be called only for alternative civilian service: it is only when dealing with the I-O registrant that the regulations make reference to the registrant "opposed to participation in war in any form. . . ." 32 C.F.R. §1622.14.

This interpretation of the language of the statute has been upheld repeatedly in decisions of this Court and of lower federal courts. The problem has most commonly arisen in the context of deciding on the treatment to be accorded to Jehovah's Witnesses, who often freely acknowledge that they will fight in a war which they believe to be ordained by their God, but refuse to fight in any war not so ordained. Despite such admissions, the right of Witnesses to conscientious objector status has been affirmed by this Court, in *Sicurella v. United States*, 348 U.S. 385 (1955), and by six of the Circuit Courts of Appeals. See, e.g., *Bouziden v. United States*, 251 F.2d 728 (10th Cir. 1958), *Mayfield v. United States*, 220 F.2d 729 (5th Cir. 1955); *Shepherd v. United States*, 217 F.2d 942 (9th Cir. 1954); *United States v. Close*, 215 F.2d 439 (7th Cir. 1954); *United States v. Hartman*, 209 F.2d 366 (2d Cir. 1954); *Taffs v. United States*, 208 F.2d 329 (8th Cir. 1953), *cert. denied* 347 U.S. 928 (1954).



## II.

**It is unconstitutionally discriminatory, in violation of the First and the Fifth Amendments to the United States Constitution, for a statute to authorize conscientious objector status for objectors to all wars, but to deny such status to those in the position of petitioner.**

We fully support and are in accord with the arguments of petitioner on this point. We would add only that the facts of amicus' case history, as set out in the Interest of the Amicus, *supra*, in the Statement of Case, *supra*, and in the Appendix to this brief, lend still further support to petitioner's contention that the recognition of religiously compelled selective conscientious objection is required under the free exercise and establishment clauses of the First Amendment, and the equal protection clause of the Fourteenth Amendment, as applied through the due process clause of the Fifth Amendment.

A reading of amicus' application for discharge renders it incontrovertibly clear that it is based upon his most deeply held religious beliefs, stemming from his lifetime of devotion to the principles of Methodism, and his determination to conduct his life according to the commands of his God.

That Lieutenant Font is not alone in his interpretation of the commands of his religion is demonstrated by the considerable support for his position which exists within the Methodist Church. In October, 1969, the Board of Christian Social Concerns of the United Methodist Church issued a statement which said, in part:

“ . . . [W]e ask that all those who conscientiously object to preparation for or participation in *any specific war* or all wars be granted legal recognition and assigned to appropriate civilian service . . . ”  
(Emphasis supplied.)

On June 12, 1970, the Kansas East Conference of the Methodist Church, the body of which amicus' local church in Kansas City is a part, also adopted, without dissent, the above statement as its own official stand on the issue of the objector to a particular war.

It is thus made manifest that to recognize the conscientious beliefs of the universal objector, and yet to fail to recognize the beliefs of one in the position of amicus or of petitioner in the present case, is to pick and choose among religious beliefs upon the basis of their content, an action which this Court has repeatedly held is not permitted to the government. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

Moreover, by refusing to grant recognition to petitioner's and to amicus' religious beliefs, the government is attempting to abridge the free exercise of religion, which is also constitutionally forbidden. This is not a case where the government seeks to restrain the individual from performing a positive act, harmful to those interests which the government is charged with protecting, as was the situation in *Reynolds v. United States*, 98 U.S. 145 (1878), and in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944). Rather, the individual here seeks to refrain from performing an act, and the government wishes to compel him to do so, contrary to his religious convictions;

this the government has been repeatedly held not permitted to do, as in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Sherbert v. Verner*, *supra*; and *In re Jenison*, 265 Minn. 96, 120 N.W.2d 515, remanded for further consideration in light of *Sherbert*, 375 U.S. 14, *modified* 267 Minn. 136, 125 N.W.2d 588 (1963).

Finally, by according to petitioner and those similarly situated different treatment from others, solely on the basis of an arbitrary and unjustifiable distinction between them grounded on the differing contents of their religious beliefs, the government is in direct violation of the standards mandated by the equal protection guarantee of the Fourteenth Amendment, *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Follet v. Town of McCormick*, 321 U.S. 573 (1944); *United States v. McFadden*, 309 F. Supp. 502 (N.D. Cal. 1970); *United States v. Bowen*, — F. Supp. —, 2 S.S.L.R. 3421 (N.D. Cal. Dec. 24, 1969); such a denial of equal protection constitutes a denial of the due process of law which the Fifth Amendment requires the federal government to accord to its citizens. Cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *United States v. McFadden*, *supra*; *United States v. Bowen*, *supra*.

## CONCLUSION

For the reasons stated, 50 U.S.C. App. §456(j) and the corresponding Army Regulation should be construed so as to grant to selective conscientious objectors the same status and treatment as is accorded to so-called "universal" objectors.

In the alternative, if the statute and regulation are not so construed, they should be declared unconstitutional in their discrimination against some religious groups and in favor of others.

In either case, the judgment of the Court below should be reversed, and the requested discharge should be ordered granted to petitioner Negre.

Respectfully submitted,

MICHAEL N. POLLET

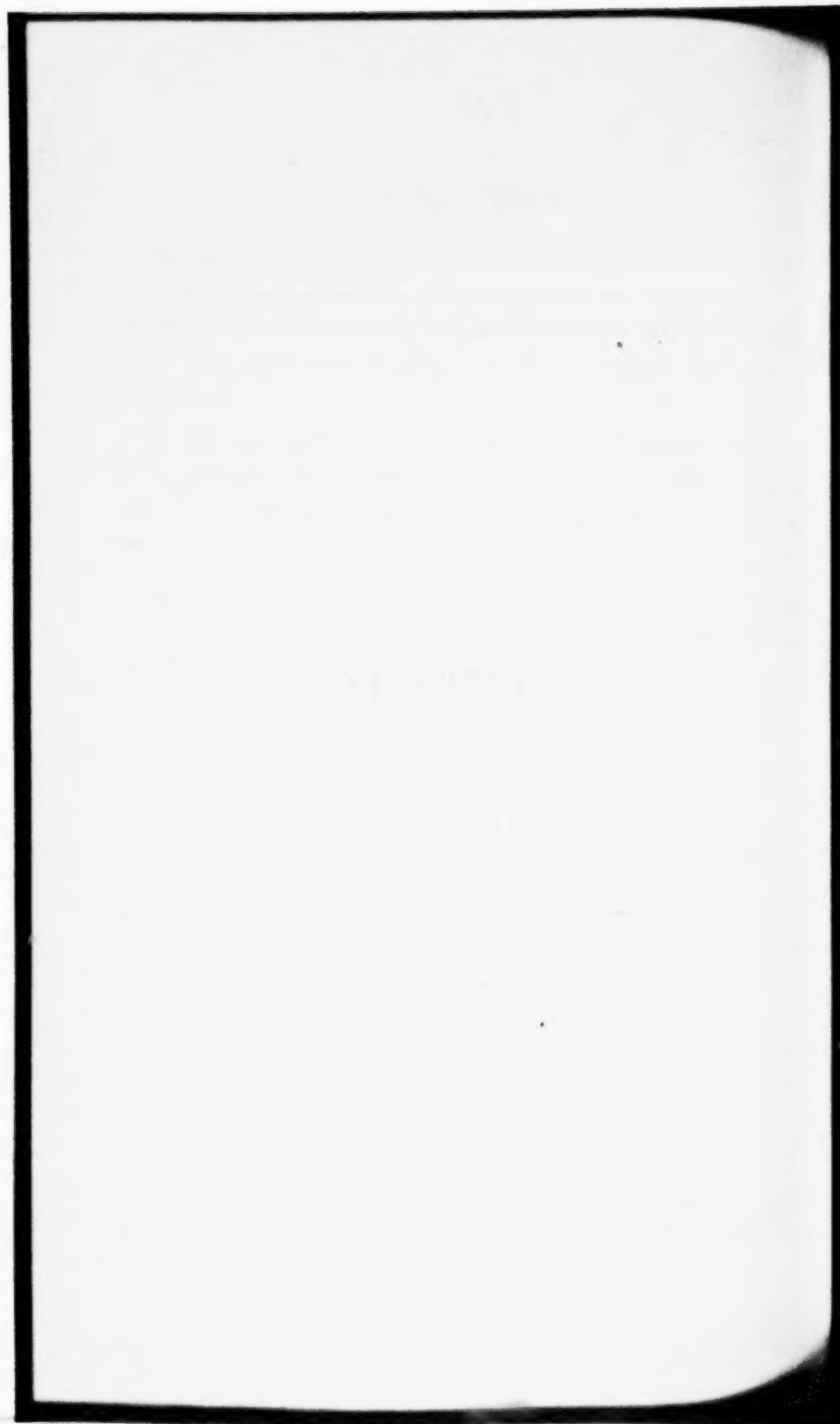
ELSBETH LEVY BOTHE

*Attorneys for Amicus Curiae\**

November, 1970.

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\* Attorneys for *amicus curiae* gratefully acknowledge the assistance of Mr. Steven Delibert, third year student at New York University School of Law.



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**APPENDIX A**

Louis Paul Font  
367 Harvard Street  
Apartment 1  
Cambridge, Mass. 02138

27 February 1970

To: Headquarters, Department of the Army

Through: Commanding General  
First United States Army  
Attn: AHAAG-PH  
Fort George G. Meade, Maryland 20755

Subject: Request for Discharge as a Conscientious  
Objector, Pursuant to AR 635-20.

Sir:

1. This is a request for recognition as a conscientious objector and subsequent discharge from the Armed Forces on grounds of conscientious objection, under Army Regulation 635-20. Included herewith is the Required Information of AR 635-20 and several supporting letters. Other letters are forthcoming.

2. I have thought long and hard about my role as a military officer during the Vietnam war. I have been guided by the statement in DOD Pamphlet 1-20, that an officer "has

veracity if, having studied a question to the limit of his ability, he says and believes what he thinks to be true, even though it would be the path of least resistance to deceive others and himself." On grounds of conscience I can in no way participate in the Armed Forces in any capacity during the Vietnam war. My religious beliefs compel me to regard the Vietnam war immoral and unjust and I cannot contribute in any capacity to an immoral war.

3. Further, I sincerely feel that in filing this conscientious objector claim, I am doing my duty to my country. Proposition XIII of the Armed Forces, as stated in *The Armed Forces Officer*, DOD Pamphlet 1-20 seems quite relevant:

Within our school of military thought, higher authority does not consider itself infallible. Either in combat or out, in any situation where a majority of militarily trained Americans become undutiful, that is sufficient reason for higher authority to resurvey its own judgments, disciplines, and line of action.

4. In accordance with AR 635-20, paragraph 6a, I hereby request that, pending a final decision on this application, I be retained in my present assignment at my present duty station as an Army student in the Army Civil Schools Program at Harvard University.

5. I have sought and obtained legal advice by counsel provided at my request by the American Civil Liberties Union. My attorneys are:

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Mr. Marvin Karparkin,  
Mrs. Rhoda H. Karparkin, and  
Mr. Michael Pollet  
c/o Karparkin, Ohrenstein & Karparkin  
1345 Avenue of the Americas  
New York, N. Y.

Mr. Melvin Wulf  
c/o American Civil Liberties Union  
156 Fifth Avenue  
New York, N. Y.

Respectfully submitted,

/s/ LOUIS PAUL FONT  
Louis Paul Font  
1st Lt., MI



\* \* \* \* \*

## (2) Religious training and belief

(a) A description of the nature of the belief which is the basis of my claim.

The value I place on human life, the value I place on individual integrity and honor, and the respect I feel for God, my Creator, compels me to submit this claim of conscientious objection to the Vietnam war. I am not a total pacifist, but after considerable meditation and study, there exists no doubt in my mind that the Vietnam war is immoral and unjust. To me, in Vietnam the United States government is destroying another country—an underdeveloped country—and in the process is destroying itself. I find this morally repugnant. Each ton of explosives takes its toll in the brutalization of the American soldier in the field as well as in lives of the Vietnamese people. Accounts of the death and hardship and the suffering of the Vietnamese people are legion; one need only read General William C. Westmoreland's June 1968 Report on the War in Vietnam to grasp the flavor of a war characterized by both massive destructive technology and the inability to distinguish combatants from noncombatants. For me to contribute to wanton destruction of life would do violence to my innermost convictions. This I cannot and will not do.

Despite the fact that as an Army student at Harvard, I am thousands of miles from the battlefield, the Vietnam war is far more than a philosophical exercise for me. Whenever my mind begins to wander, it is jerked to reality by the reminder that I am an officer. An officer is expected not only to contribute his individual talent but also to enlist the cooperation of other officers and enlisted men. I know down deep inside me that I could no more lead a company of men—120 souls—in Vietnam than I can cease to be

Louis Paul Font, human being. I cannot write condolence letters to the mournful mothers and fathers and new widows. I have seen military funerals up close; I have served on the honor guard of some of my close friends who are now interred at the West Point Cemetery. I know it would destroy me to gaze into the tearful eyes of a mother whose son I led in a war I regard as immoral.

To me, the war is destroying the integrity of the United States and of some of its best men. I have spoken with Vietnam returnees. Some of what I have been told has jarred my conscience. There is no doubt in my mind that this war is dehumanizing some of America's finest men, some of America's finest military officers. At West Point I once spoke with a Major, not a member of the academic faculty. I asked him, "How does it feel to kill?" He replied, "I feel the same elation as when I kill deer." I could not believe his words. I paused for a moment, collected my thoughts, and then asked, "Do civilians die in Vietnam, and if so, to what extent?" He then said, and these are the exact words he used, for they are etched in my memory: "Cadet Font, it is like this. You are walking down a street after a battle and you see a six-year-old girl lying there. You roll her over (and with this he made a rolling motion with his foot) and you say 'How about that, the Viet Cong are now using six-year-old girls to do their dirty-work.'" I stood listening, dumbfounded. I had asked the questions because they were on my mind; his replies caused me to investigate further questions pertaining to the Vietnam war and conscience and religious belief. This claim, written after considerable personal anguish, is the result of my inquiry.

I hasten to add that I in no way mean to disparage the Armed Forces by relating this incident. The abhorrent

incident concerning the village of Song My and its inhabitants has already painted a dark and bloody picture of many officers and enlisted men in the U.S. Army. Also, I should point out that at West Point and elsewhere I have met many officers whom I regard with the highest esteem. Nevertheless, I did war with my conscience to learn, for example, of the photograph mailed in a Christmas card by Colonel George S. Patton III. According to public reports, the color photograph featured Col. Patton standing before a pile of dismembered Vietnamese bodies; the caption on the card read "Colonel and Mrs. George S. Patton III—Peace on Earth." Col. Patton is now a Brigadier General. Countless times I have asked myself: Is this the American ideal or has America somehow gone astray?

The underlying premise of my religious beliefs is that human life is of value, of high value, of sacred value. Life is precious and is to be cherished and respected. Life is a divine spark, a gift of God that knows no color or creed, like love. Snuffing out a divine spark—taking the life of another human being even in the hope of saving others, even in a just war—is, at best, of marginal morality. My religious beliefs compel me to believe that the gross and indiscriminate level of violence applied in Vietnam tips the moral balance strongly on the side of the immoral, of unjustness, and therefore the taking of any life in Vietnam, or contributing to that effort, is impossible for me. To me, the Commandment "Thou shalt not kill" at a very minimum points to the inherent sanctity and worth of life. If my Methodist upbringing and belief means anything at all, it certainly means—it *must* mean—that a person's life is of value.

The Golden Rule, "Do unto others as you would have them do unto you," compels me to view the Vietnam war

from the standpoint of the victim, the Vietnamese peasant and the American soldier. I am convinced that it makes no difference whatsoever to the Vietnamese who looks up into the sky and sees silver napalm canisters tumble down toward him, whether the napalm falls because the United States government loves him or hates him or is liberating him or pacifying him. The point is that the bombs fall and the human being is dead—and with him a trace of mankind and humanity. In the words of John Donne, the English poet, "No man is an Island, entire of itself; every man is a piece of the continent, a part of the main . . . any man's death diminishes me, because I am involved in mankind . . ."

It is only after long and careful study, meditation, and prayer with my God that I have come to these conclusions. I have had to ask myself some difficult and grueling questions: Given that I regard the Vietnam war as immoral, can I, should I accept assignment to Vietnam, even if to sit behind a desk in Saigon? Could I perform my job with the initiative and high performance expected of a West Point graduate? Does a moral man, whose religious beliefs compel him to find the Vietnam war immoral, remain in the Armed Forces that wages that war? Where do my loyalties lie when there exists a clear conflict between my duty to God and my duty to my country?

Over the last several months I have sought answers to these questions in religious readings and other books, in discussions with my friends, in discussions with theologians, but always, in the sound of silence, the questions return to gnaw at my conscience. When I consider this ordeal, the words of the Greek poet, Aeschylus, seem appropriate:

Even in our sleep, pain  
which cannot forget,  
falls drop by drop upon the heart until,  
in our despair, against our will,  
comes wisdom through the  
aweful grace of God.

My "wisdom," my irrevocable and undebatable conclusion, my deepest emotions founded on my religious belief, compel me to reject participation in the Vietnam war as immoral . . . I feel this with my whole being. I feel this with the same sort of total awareness that compelled John Wesley, the founder of Methodism, to separate himself from the Anglican Church on grounds of conscience. To be able to live with myself and others, I must file this claim. The following passage from Luke, ch. 6, v. 49, illuminates my position: "But he that heareth, and doeth not, is like a man that without a foundation built a house on the earth; against which the stream did beat vehemently, and immediately it fell; and the ruin of that house was great." Were I to do nothing, or were I to allow my conscience to be violated, I would no longer be of any value to myself or to the country that I cherish.

In essence, then, I have concluded that I am part of an immoral force, an Army engaged immorally in war. In clear conscience I cannot participate in the Vietnam war in any form; I cannot squeeze the trigger that would unjustly take another human life, I cannot command others to do so. I cannot participate in any way in a military organization where such things are being done. I therefore respectfully request discharge from the Armed Forces. I place my trust in my God and in the United States of America.

## 2(b) The sources of my religious belief

Most of all, my religious training and belief comes from a re-evaluation and application of those religious principles that I have been taught all of my life. During the past year I have spent many hours trying to discern the meaning, in light of the Vietnam war, of those religious principles I learned in a Christian home, in an active church life, in the Boy Scouts of America, at the United States Military Academy, and in the numerous books I have read.

The more I have learned about the Vietnam war, the greater my moral doubts have become and the more I have sought answers in the religious principles I have long been taught.

It was during my last semester at West Point that I first detected any conflict between the dictates of my conscience and the dictates of my country. At West Point religion is part of daily life. The Protestant Chapel on the Academy grounds stands high above any other structure or any other terrain. Religious training is considered so important in the development of the character of the cadet that attendance at religious services is compulsory. At West Point, however, it is generally assumed that duty to God and to Country are one and the same. Matters of conscience in this regard are discussed little, if at all, and the intense and rigid military atmosphere made it difficult for me to investigate seriously religious principles regarding conscientious objection. No one discussed, for example, the moral dilemma of the Southern officer who at the outbreak of the Civil War found himself in the Northern Army, or of the Southern Cadet, during the same period, at West Point.

As public outcry on the war intensified, my thoughts turned to the Vietnam war. I was as much concerned with matters of foreign policy, however, as of conscience. This was only normal for a cadet interested in government and soon to attend graduate school in government. Indeed, when I first arrived in Cambridge my priority was still foreign policy. I took a seminar course entitled "National Security Policy" with Dr. Henry Kissinger, now Special Assistant to President Richard Nixon. One main topic in this course was Vietnam. As it developed, the more I learned about the war, the more I began to think, and the more I turned to religion.

Indeed, to me, the important thing about Cambridge, Mass. is that I have had the time to think. This is the element that for me, was missing at West Point. In Cambridge, countless hours of my free time were spent walking quietly along the Charles River, thinking and meditating and praying. In March 1969 I began attending Quaker meetings at the Friends Meeting House in Cambridge.

Then in June 1969 there occurred a personal incident which compelled me to feel that I was either a conscientious objector or well on my way to being one. It was an incident that brought out my sensitivities in all their rashness. I was seated in a cafeteria on campus with three other members of the Kennedy School of Government, each a Vietnam returnee: one in the State Department, one in Agency of International Development, and the other, an officer in the Armed Forces. They began reminiscing about the Vietnam war. The conversation turned to how each would like to return to Vietnam after the war because Vietnam is such a beautiful country. Then the conversation turned to the impressment of soldiers into the National Liberation Front by Viet Cong. Someone mentioned that

the South Vietnamese Army does exactly the same thing: surround a village, close in, take away the able-bodied men. I understand the necessity for such action even though it bespoke untold tragedy. But then they all laughed; for them, the tragedy was comedy. I felt a sense of uncontrollable and mounting moral outrage mixed with confusion. Here were some of my best friends acting in what, to me, was such a callous and dehumanized manner. I soon could no longer remain silent and I literally blew up. I told them, practically yelling, that I saw nothing whatsoever to laugh about, that the people were suffering unbearably, and that they, too, were victims of the Vietnam war. It was their turn to be shocked. They told me that I simply did not understand the customs of the Vietnamese.

For long afterwards the incident remained etched in my mind. I asked myself: If I go to Vietnam will I return like them? Am I now like them, and if not, why not? It was a week after this incident, in June 1969, that I first sought counsel. Since then, with mounting intensity, my thoughts have been engulfed by the Vietnam war and religious matters. I have turned to the sources of my belief as well as to authors who were previously unknown to me.

Among the sources of my belief that I have re-examined is the West Point Cadet Prayer. I find that this prayer basically embraces those ideals upon which I base this claim, and also exemplifies the principles I gained as an adolescent, from other sources. Since I consider this prayer of primary importance in my life, it is best to quote it in full:

O God, our Father, Thou Searcher of Men's Hearts, help us draw near to Thee in sincerity and truth. May our religion be filled with gladness and may our worship of Thee be natural.



Strengthen and increase our admiration for honest dealing and clean thinking, and suffer not our hatred of hypocrisy and pretence ever to diminish. Encourage us in our endeavor to live above the common level of life. Make us to choose the harder right instead of the easier wrong, and never to be content with a half truth when the whole can be won. Endow us with courage that is born of loyalty to all that is noble and worthy, that scorns to compromise with vice and injustice and knows no fear when truth and right are in jeopardy. Guard us against flippancy and irreverence in the sacred things of life. Grant us new ties of friendship and new opportunities of service. Kindle our hearts in fellowship with those of a cheerful countenance, and soften our hearts with sympathy for those who sorrow and suffer. Help us to maintain the honor of the Corps untarnished and unsullied and to show forth in our lives the ideals of West Point in doing our duty to Thee and to our Country. All of which we ask in the name of the Great Friend and Master of men. Amen.

I accept these words without reservation; to me, the courage to be is the courage to live up to such a code.

I must choose the harder right instead of the easier wrong; I must, in all honesty and sincerity, act on my beliefs if I am to maintain my integrity as a human being, or simply, as a person who can live with himself. I must guard against flippancy and irreverence in the sacred things of life—like life itself. I must soften my heart with sympathy for those who sorrow and suffer. The sorrowing and suffering in Vietnam is so extensive as to be unimaginable.

I ask myself: How many times can a man turn his head and pretend that he just does not see? How many deaths does it take before too many people have died?

I must maintain the honor of the Corps untarnished. For me to participate in any way in the Vietnam war is an unjustified taking of human life, something which would dishonor my country as well as the United States Military Academy.

The religious ideals emphasized in the West Point Cadet Prayer, in essence, are the same ones I learned at home as a child. My parents, devout and active Methodists, did their best to teach and instill in me honesty in daily affairs, respect for the rights and feelings of others, a dedication and regard for integrity, and an intense desire to lead a life of service. I come from a family that is very close, the sort of family that has been through both hard and joyous times together, the sort of family who plays and prays and shares together, and the sort of family whose dream came true when their son attended and graduated from the U.S. Military Academy. I well remember a photograph we have in our family album. It is of my sister and me, at ages six and eight, seated at Trophy Point at the Academy with a cadet seated between us. I often consulted this photograph in the private and quiet fantasies of youth, and I resolved to prepare for the West Point ideals as well as live by them. As it turned out, I became a West Pointer. Coincidentally, my sister became a Captain in the Army Nurse Corps and was stationed for two years at West Point.

My family and I attended church services every Sunday, and, in fact, our life revolved around the church. My father taught Sunday school for years and he also served as presi-

dent of the Methodist Men's Club of our church. While I was in junior high and high school I attended many church dinners and meetings in which my father was the presiding officer. My father is also a lay preacher of the Methodist Church, and as such, gives sermons in various churches in the Kansas Area Conference. I can well remember sitting in the church pew listening to my father speak to the congregation. One sermon he has given, for example, is entitled "Lead, Follow, or Get Out of the Way." It was only natural, then, for me to feel that for a while I should follow—at West Point during plebe year I must follow—so that later I could and should be a leader. My mother and two sisters, of course, were also active in the church: Sunday School, church suppers, picnics, banquets, Women's Society meetings, church discussion groups.

With all the church activity around me and the normal son's desire to follow in the footsteps of his father, I also participated actively in religious activities. In junior high school and high school I served as president of the Methodist Youth Fellowship and represented my church at district youth meetings. In this way I was able to speak with young people from different congregations and bring new ideas back to my local church. In junior high school I sang in the choir; later I taught Sunday School to my contemporaries and also to those a few years younger than me. This required study in such areas as the life of John Wesley, founder of Methodism, or the meaning of a passage from the Bible. In preparing these lessons I found the volumes of the Interpreter's Bible that we have at home helpful. Also, some Sundays I offered a prayer during the regular service or served as a candlelighter. In effect, then, on any given Sunday most, if not all, of my day was

spent in religious activity: Sunday School, Church service, Methodist Youth Fellowship meeting, church supper. During the summers I would spend ten days in religious activity at a Youth Retreat at Baldwin University at Baldwin, Kansas. These were ten days reserved for prayer and meditation and Christian fellowship with young Protestants from across the state.

Also, though my family is Methodist and we attended the Methodist Church practically every Sunday for as long as I can remember, we also visited churches of other faiths: Presbyterian, Episcopal, Catholic, Unitarian. This was done purposefully by my parents as an educational exercise for their children, and to emphasize to us that other persons may have religious beliefs different from ours but that their beliefs are also worthy of respect. This tendency in my family to at least touch on other religions derives from the fact that my mother was raised as a Catholic and then became Methodist after marrying my father, and also because my father was raised in New York City where as a young man he was exposed to several other religions. It is from these factors that I, in turn, feel a sense of universality in religions: though the core of my belief is Methodism, I feel liberated rather than confined by my belief. Perhaps it is for this reason that the interdenominational Protestant Chapel at West Point appealed to me, and why, after tasting of services at a variety of churches in the Boston and Cambridge area (Friends Meeting House in Cambridge, Old South Church in Boston, Harvard Epworth Methodist Church in Cambridge, St. Paul's Cathedral, and others), I have settled on Memorial Church in Harvard Yard with its interdenominational services.

My career as a Boy Scout is also of religious significance. From ages 12 to 18 I was a very active member of the Boy Scouts of America, an organization whose creed embraces the same concepts of Duty-Honor-Country as does West Point. I should mention that I was especially eager to participate in the Scout movement because my father, an Eagle Scout in his youth, took special interest in my progress. For a year during my Boy Scout career he served as Scoutmaster of my Troop. The Boy Scout Troop I attended was sponsored by my church, Quayle Memorial Methodist Church in Kansas City, Kansas, and the Scout meetings were held each week at the church. I learned and repeated and believed in—as I continue to believe in—the Boy Scout Oath: "On my honor I will do my best to do my duty to God and to my country . . . " The Scout Law, another solid foundation of belief, was instilled in me: "A Scout is Trustworthy, Loyal, Helpful . . . Brave, Clean, and Reverent." In the area of Scout Reverence I both proved myself and acquired some of my religious training and belief by earning the God and Country Award, an award jointly presented in a church ceremony by the minister of the church and the Scoutmaster of the Troop. The award entailed over two years of service to the church and community and a lengthy written examination on Methodist belief and church history.

There is another main source of my religious belief: my education, or more particularly, the books I have read, both in and out of the classroom. For purposes of illustrating the evolution of my beliefs, I have chosen one book from each of three periods in my life which, at the time, were of serious influence.

In high school I read *Profiles in Courage* by John F. Kennedy. This book still inspires me to combine service with integrity. Upon rereading, I find the following passage, concerned with men who stood firm to their principles, quite relevant: "... each one's need to maintain his own respect for himself was more important to him than his popularity with others—because his desire to win or maintain a reputation for integrity and courage was stronger than his desire to maintain his office—because his conscience, his personal standard of ethics, his integrity or morality, call it what you will—was stronger than the pressures of public disapproval."

The second book which influenced my life, is *The Art of Loving*, by Dr. Erich Fromm, a world-famous psychoanalyst, which I read during my senior year at West Point. Dr. Fromm discusses both theory and practice of brotherly love, self-love and love of God. In effect, Dr. Fromm points to attributes that are essential, I believe, to all persons, including the military officer.

A third book—one that I read at Harvard—that has made an impact on my life is *I and Thou* by Professor Martin Buber. This powerfully written essay, written over 25 years ago by a philosophy professor at Hebrew University, emphasizes the spirituality and humanity of man viewed from the standpoint of the individual, of you and me, of *I and Thou*.

I have, of course, read other books. At the beginning of my senior year at the U.S. Military Academy, as part of my prescribed course work, I read *The Arrogance of Power* by Senator J. William Fulbright. This book influenced my belief. At a minimum, it served to place the Vietnam war in the forefront of my mind. Also, in his

book Senator Fulbright discusses "the higher patriotism," the courage to dissent, to stand for one's convictions, to refuse to substitute consensus for conscience. He writes: "In a democracy dissent is an act of faith. Like medicine, the test of its value is not its taste but its effect, not how it makes people feel at the moment but how it makes them feel and moves them to act in the long run. Criticism may embarrass the country's leaders in the short run but strengthen their hand in the long run . . . "

Outside of classroom activity, I discovered and began reading the works of the French writer, Albert Camus. In his "Letters to a German Friend," for instance, he writes "And I should be able to love my country and still love justice." It is also Camus who, with his typical concern for humanism—the regard for the individual, the noble figure in the flesh—has written, "I loathe none but the executioner." Also relevant in my life, "We got into the habit of living before we got into the habit of thinking."

As a result of a political philosophy course I took at the end of my senior year, I discovered the works of Dietrich Bonhoeffer, a German theologian who wrote in the 1930's and 1940's. At the beginning of his *Ethics*, a book that emphasizes that God's commandment is to be found not only in the church but also in family, labor, government, there is a poem entitled "Stations on the Way to Freedom." It reads in part:

Do and dare what is right, not swayed by the whim of the moment. Bravely take hold of the real, not dallying now with what might be. . . . Make up your mind and come out into the tempest of the living. God's command is enough and your faith in him to sustain you.

Dietrich Bonhoeffer lived up to his words. In April 1945, determined to the last to "do and dare what is right," he was hanged by the Nazis.

I have continued, since arriving in Cambridge, to read in the general area of theology. Among these books are some of the writings of Dr. Paul Tillich: *The Dynamics of Faith* and *The Courage To Be*. Dr. Tillich's discussion of faith was important to me because at the time I read it, about a year ago, I was preoccupied with whether there is a God. I was trying to reconcile my own thoughts and training with the divergent views of such men as Bertrand Russell, Albert Camus and Dietrich Bonhoeffer. I concluded that all arguments boil down to faith and that I have that faith. Dr. Tillich also wrote in *The Courage To Be* of the spiritual basis—the being—of leading a life of integrity, of choosing the "harder right instead of the easier wrong." As such, *The Courage To Be* is both a call to action and a theoretical dissertation. This sort of book, combined with the opportunity to discuss its contents with my close friends and several theologians I have visited, has enabled me to better grasp my own beliefs and those of other persons.

In summary, then, my religious beliefs are those principles I have been taught all of my life—at home, at church, in the Boy Scouts, at the U.S. Military Academy—as I now apply them in light of extensive study and meditation and in light of the Vietnam war. I am, of course, certain of my religious beliefs and their sources, yet it would not surprise me if some persons who do not know me attribute dishonorable motives to my claim. I can only say that I am 23 years old and have not yet been in a situation, other than the intensive discipline and constant testing of West



Point, which would demonstrate my courage. While I cannot say that I am the bravest member of my class, I believe that at a minimum, I am as brave as the fellow next to me. Were the Vietnam war, to me, a just war, I would be more than willing, and I am sure quite able, to lead men in battle. I do not think that my superiors at West Point made a mistake in their various determinations, made on the basis of continuous testing, supervision and review, that I have the moral character and capacity for bravery which all West Point graduates must have. I think I have the same strengths and capacities now as when I graduated and was commissioned. But, for the reasons I have tried to indicate, my moral position has been so profoundly changed that I must seek discharge from the Army.

2(c) Names and addresses of individuals upon whom I rely most for matters of religious guidance in matters of conviction relating to this claim.

I rely on several persons for religious guidance and other matters related to conscientious objection to the Vietnam war. Among them are the following: Dr. Robert Hamill (Methodist) Dean of Marsh Chapel, Boston University, Boston, Mass.; Reverend Charles P. Price, Memorial Church, Harvard University, Cambridge, Mass.; Mr. Elmer Brown (Quaker) Executive-Secretary of the Friends Meeting House in Cambridge, Mass.; Rabbi Herman Pollack (Jewish), Religious Counselor at the Massachusetts Institute of Technology, Cambridge, Mass.; Rabbi Ben Zion Gold (Jewish), Harvard University, Cambridge, Mass.; Dr. Paul Deats (Methodist), School of Theology,

Boston University, Boston, Mass.; Dr. Ralph Potter (Presbyterian), Harvard Divinity School, Cambridge, Mass.

2(d) The circumstances under which I believe in the use of force.

I feel that my conscientious beliefs are moving toward universal pacifism. However, at the present time and in all honesty, I must state that I am a selective conscientious objector: I object to participation in the Vietnam war in any form.

I believe there are times when an individual or a nation may morally engage in the use of force. As I stated previously, however, I also believe that the taking of another man's life is always of marginal morality, no matter what the cause. In light of the complexity of the subject, I cannot draw the fine lines between the moral and immoral uses of force and violence. But at present my religious beliefs and conscience are confronted by the Vietnam war and there is absolutely no doubt in my mind that the Vietnam war is immoral and unjust.

When I apply the Just War theories as laid down by St. Thomas Aquinas, St. Augustine and others, to me at a minimum, the Vietnam war is rendered unjust by the vast scale and proportion of destruction deployed, especially in a war characterized by the inability to distinguish combatants from noncombatants. The way my conscience forces me to see it—the way I *feel* it—the U.S. government is destroying another country and culture and in the process is destroying itself and its integrity. As such it is my conviction that the Vietnam war is immoral; for me to participate in any way in an immoral war is the most extreme form of violence to my conscience.

- 2(e) Describe the actions and behavior in your life which most conspicuously demonstrate the consistency and depth of your religious convictions which give rise to this claim.

A consistency between my beliefs and my behavior is found in my increasing preoccupation with the Vietnam war and matters of religion. During my senior year at the Academy I was quite concerned with the Vietnam war. The same can be said, to an intensified degree, of my first year in Cambridge. However, since June 1969, the Vietnam war and matters of conscience and religion have practically engulfed my life. My psychic energy has been expended on these matters, so has my time, so has my physical energy. My relationship with my friends, many of them military officers, have been strained by my beliefs and my willingness to express them, as well as by my inability to concentrate on matters other than the war and conscientious objection. I have purchased and read numerous books on the Vietnam war, on theology and on conscientious objection, and have written of my findings. In section 2(f) of this application I list the papers I have written and their subjects. Suffice to say that it takes time and energy to produce such work. I have read books in an effort to better be able to answer recurring questions that have been gnawing me: Where do my primary loyalties lie? Of what relevance to my religious views are the Just War theories of St. Thomas Aquinas, St. Augustine and others? Am I a conscientious objector? Can I serve in the military in any capacity during the Vietnam war? In my quest for meaning I have read or reread such books as Paul Tillich's *The Courage To Be* and *The New Being*, the three volumes of Bertrand Russell's *Autobiography*,

Erich Fromm's *The Same Society* and *Escape from Freedom*, and most of the work of Albert Camus. Also, of course, I have consulted the Bible, most particularly the tranquility I have found in the Psalms.

Aside from attending church services regularly, I have consulted with several theologians in the Boston and Cambridge area in order to better grasp the meaning of Humanism, Methodism, passages from the Bible, and the relationship of these to my religious beliefs—and to my integrity. The names of some of these men are listed in section 2(c) of this application.

Also, and something I consider quite important, during the last several months I have joined organizations which, after extensive study, I have found to be consistent with my Methodist and Humanist belief. In August 1969 I became a member of the American Humanist Association, an organization which was incorporated in 1941 as an "educational membership organization," and whose creed reads in part, "Humanism accepts ethical responsibility for human life, emphasizing human interdependence." I also joined the American Civil Liberties Union, feeling that an Army officer, as it states in DOD Pamphlet 1-20, *The Armed Forces Officer*, should have a "strong belief in human rights" and "respect for the dignity of every other person" and "an abiding interest in all aspects of human welfare." Recently I joined the Methodist Peace Fellowship, a pacifist organization affiliated with the Fellowship of Reconciliation. The Fellowship of Reconciliation is an interdenominational as well as international peace organization founded in Europe after World War I and recognized by the United States government as a peace organization.

Aside from matters related directly to my activities in Cambridge over the last several months, the consistency in my professed religious beliefs and in my regard for my country is perhaps found in the faith others have placed in my principles and character, and in the extent to which I have put forth my maximum effort. I graduated from West Point as a Distinguished Graduate, standing in the top 5% of my class. In a class of 706 I stood number 31 in General Order of Merit, a ranking which includes military aptitude and physical education as well as academic endeavor. I ranked first in my class in foreign language, second in law, and in the top ten in psychology, history and social sciences. In my senior year I was selected as one of nine cadets to represent West Point in the Rhodes Scholarship competition. In September 1967 I was chosen as one of four cadets to represent the United States and West Point in Santiago, Chile, in ceremonies of "El Dia de La Patria." In August 1966, as a junior, I was one of four cadets representing the Academy in an exchange trip with the Mexican Military Academy in Mexico City; I was cadet-in-charge of the trip. On several occasions I have represented West Point in model United Nations Assemblies with college students from across the nation; for two years I participated in a Latin American roundtable of the Student Conference on United States Affairs held annually at West Point, in which over one hundred schools are represented. In my senior year I was selected to represent the Academy on the Dorothy Gordon Youth Forum television program discussing "Latin American Unity" with other college seniors and the Assistant Secretary of State of Inter-American Affairs. Also, I should mention that in my senior year for three months I served as Adjutant of a Cadet Battalion, responsible for the administra-

tion and personnel requirements of over 400 cadets. I also served as Transportation Chairman of the Student Conference on United States Affairs, being directly responsible for the transportation requirements of over 250 people. There is another fact which deserves mentioning since at West Point it is no small feat. I was one of those who "never walked," that is, never during my cadet career did I go over my allowed number of demerits for any month.

Further, I was endorsed by the Academy and the United States Army to attend graduate school, and I was accepted at Harvard University for two years of study at the John F. Kennedy School of Government leading to the Master in Public Administration degree. I came to Harvard to better prepare myself for a life of service to my God and to my country; in the application for admission I put it this way: "I now ask you for the opportunity to invest my talent at the Harvard University John F. Kennedy School of Government to enable me better to serve my country. In the words of the late President Kennedy, addressing the West Point graduating class of 1962: 'Our Armed Forces must fulfill a broader role—as a complement to our diplomacy—as an arm of our diplomacy . . . the military problems which we face will also be non-military—diplomatic, political and economic.'"

Perhaps some consistency in my beliefs is also shown by the awards and honors I earned during an earlier period in my life, in the Boy Scouts of America. I should first mention that in the Mid-west the Boy Scouts and the church are closely affiliated, the Troop meetings are often held in the Church, and such was the case with the Troop I attended. After two years of work in the church and a lengthy written examination in Methodist belief and doc-

trine, I earned the God and Country Award, an award which combines the reverence of a Scout with his duty to service. Further, at the age of fourteen I attained the highest rank of the Boy Scouts, the Eagle Award. The Eagle, of course, stands as a symbol of America and citizenship. In 1962 I was chosen to represent 10,000 other boys and as one of six young men in the State of Kansas to make the annual Report to the Governor during Boy Scout Week, presenting the Governor with a statement and having luncheon with him.

Also consistent with my beliefs are my activities during the summer of 1968, the summer after graduation from West Point and before coming to Cambridge. I served as a volunteer counselor at Camp Friendship, a Mennonite-sponsored camp for underprivileged children from the Washington, D.C. area. For two weeks I lived in a log cabin with eight young black boys. I then worked for my Congressman, a Republican from Kansas, again as a volunteer, for a month in his Washington, D.C. office. I balanced this experience with volunteer work in the office of Senator George McGovern, Democrat from South Dakota.

At this point in my life, the only action that I can take which is consistent with my beliefs is the filing of this conscientious objector claim. I devoutly believe that the filing of this application is consistent with the strong devotion and sense of honor imbued in me at the United States Military Academy. If I were a different person, were my convictions not as strong, there would be other courses of action open to me. With my education and as a Military Intelligence officer, were I assigned to Vietnam I could request to sit behind a desk writing reports. Afterwards I could return to West Point and teach for two to four years. Then, if I so desired, I could resign from the

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Armed Forces. But, for me to take such a course of action would be to deceive others and myself. I therefore seek separation by Army Regulation, even if such action causes my family some embarrassment, and even if such action divides me from my military friends, and from my childhood dreams.

• • • • •



(Letterhead of Saint Paul School of Theology  
Methodist, Kansas City, Missouri 64127)

February 24, 1970

Gentlemen:

I have read the statement of Louis Paul Font concerning his religious beliefs, training and conscientious objection to participation in the war in Vietnam. His statement in my judgment demonstrates an understanding of the Methodist Church's position on war and conscientious objection. He also gives every indication of sincerity and gradual growth into his present position with respect to the war.

Font's statement is somewhat typical of the young Methodist who cannot escape his early home and church training even though for a time he had assumed he could undertake a military career. The unusual thing about his statement is that it is not a reaction against his military training but a conviction against participation in the war in Vietnam. This shows a very great sensitivity of conscience about war in the light of the Christian tradition concerning war. Within that tradition are two types of conscientious objectors, those who cannot participate in any war and those who examine each war in the light of Christian teaching. Font takes the latter position of objection to a specific war which has long been a valid Christian position recognized not only by Christian theologians but also by Churches and Church agencies via specific adopted resolutions.

I wrote the above not simply as a Methodist minister, but as one who since 1939 has been involved in counselling

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with hundreds of conscientious objectors and in formulating policy statements of both church and government with respect to conscientious objection.

Sincerely,

/s/ JOHN M. SWOMLEY, JR.  
John M. Swomley, Jr.  
Prof. Christian Ethics

JMS:jmh

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(Letterhead of Headquarters, United States European  
Command, APO New York 09128)

24 March 1970

Commanding General  
First United States Army  
Fort George G. Meade  
Maryland 20755

1. I have been asked to comment upon the sincerity and character of First Lieutenant Louis P. Font, USA, pursuant to his application for discharge as a conscientious objector (Inol 1). I have read a copy of Lt. Font's petition of 27 February 1970 submitted in accordance with AR 635-20.
2. I knew Lt. Font during my tour of duty as an instructor, Department of Social Sciences, U.S. Military Academy, from 1964 to 1968. Font was my student, a member of the debate team I coached, and a friend and counselee during this period.
3. Based upon my contacts with Font and observation of his performance at West Point, I will attest that he was a very serious, pensive, conscientious young man completely devoted to the ideals of "Duty, Honor, Country" and the military service. He was an ideal and outstanding young man in every aspect of Cadet endeavor—academic, athletic, leadership and moral integrity. I had no doubts concerning the personal sincerity of his convictions, the loftiness of his ideals, the intellectual prowess by which he arrived at his conclusions, and the moral rectitude of

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his character. He was without guile or self-seeking, and wholly dedicated to the values of West Point. I strongly endorsed his application for a Rhodes Scholarship, being convinced that he fully met the high intellectual, leadership, moral, humanistic and public service qualifications demanded. I know of no incident, circumstance or trait which would cause me to change my high opinion of Font's strength of character, moral courage and sincerity.

4. However, at no time during our acquaintance can I remember that we ever discussed his religious beliefs or moral feelings toward the war in Viet Nam. Furthermore, I have not seen nor corresponded with Font since his graduation from USMA in June 1968. Hence, I cannot comment on the substantive matter of his application for discharge as a conscientious objector based on his religious beliefs, nor would I presume to advise on the disposition of this difficult matter except to hope that it will be resolved wisely in the best interests of the Army.

/s/ JAMES R. MURPHY  
JAMES R. MURPHY  
Major, USAF  
439-44-6649

AVDCCS

14 April 1970

Commanding General  
First United States Army  
Fort George G. Meade, Maryland 20755

1. I write on behalf of First Lieutenant Louis Paul Font, MI, United States Army, who has applied for conscientious objector status and subsequent discharge from military service.
2. My connections with Lieutenant Font were quite close while our tours at West Point overlapped for a year and a half, he as a cadet, and myself as an assistant professor in social sciences. Although I never taught him in a formal class, we worked together in extracurricular activities and seminars. He was committee chairman for a large student conference; I was a faculty advisor working directly with him. He was an applicant for a Rhodes Scholarship; I was the secretary of the selection committee. We discussed often the problems of service and ethics in my office and quarters at West Point, both before and after his graduation; in his apartment at Harvard; by ourselves; and with his friends. I have met his parents and family. I feel I am very well qualified to judge his character.
3. Lieutenant Font aims at and attains the highest standards of integrity. His character and honor are beyond reproach, and it is his complete intellectual honesty and "genuineness" which are among his qualities of character that I admire most. He has an exceptionally inquiring mind, and he is not satisfied with answers unless he agrees with the premises on which they are based. In our many long discussions, one of the fundamental bases upon which

our friendship developed was the commonality of our ideals of service and ethical behavior. He is, as his testimony amply details, a man very much concerned with the morality of his, and others', actions. His involvement with the ethics of his then-chosen profession was not a preoccupation developed overnight. It was an integral part of his character that I observed at least as far back as the spring of 1967.

4. With respect to Lieutenant Font's courage, I can only extrapolate from my understanding of him in reasonably settled circumstances. I have never observed him in great physical danger where physical courage would be essential—but I have no doubt he possesses more than enough to face combat. As to his moral courage, it is one of his strongest attributes.

5. I personally regret that he has reached the conclusions he has about the war in Vietnam and, rather obviously, I do not agree with them. Be that as it may, I am certain his convictions are sincere and that there is no intent here to represent falsely a belief not actually held.

6. I recommend that his request for recognition as a conscientious objector and for discharge from the Armed Forces be approved.

C. P. HUTTON

Major, GS (Armor)

Assistant Chief of Staff

(This letter is a carbon copy. As of 20 April 1970 the original had not arrived at HQ, First U.S. Army.

The return address is Major C.P. Hutton, HHC, 25th Infantry Division, Vietnam, APO SF 96225.)

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DEC 4 1970

E. ROBERT SEEVER, CL

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

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No. 325

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LOUIS A. NEGRE,

v.

STANLEY R. LARSEN, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY BRIEF ON BEHALF OF PETITIONER

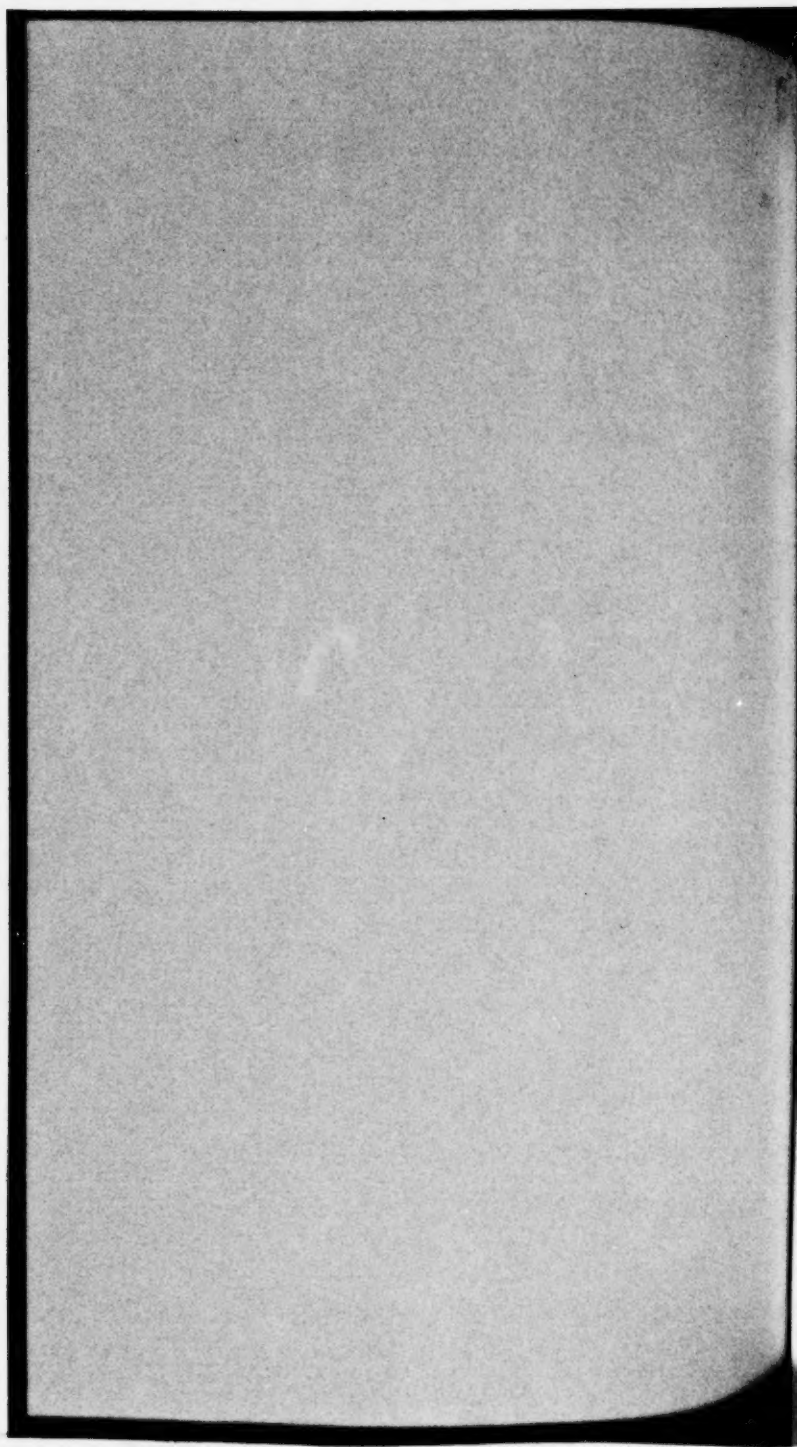
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In The  
Supreme Court of the United States  
October Term, 1970

No. 325

Louis A. Negre,  
v.  
Stanley R. Larsen, Et Al.

ata in Reply Brief on Behalf of Petitioner

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page 7 insert after line 23:  
discriminate between just wars in which he  
has a religious duty to

page 8 line 12 insert "speak" for "speech"

page 16 penultimate line after "men" insert:  
applying for and receiving conscientious ob-  
jector status is insignificant compared to  
the number of men

page 17 line 8 insert "113" for "111"

page 17 line 19 insert "contrast" for "contract"

page 17 line 24 insert "Judaeo-" for "Judea"

page 17 line 25 insert "revelation" for  
"revelations"

(ii)

United States ex rel Beatty v. Healy, 424 F.2d 299 (5th Cir. 1970) . . . . .	9
United States ex rel. Brooks v. Clifford, 409 F.2d 700, 708 (4th Cir. 1969) . . . . .	12
United States v. Haughton, 413 F.2d 736, 742 (9th Cir. 1969) . . . . .	12
United States v. Kauten, 133 F.2d 360 (8th Cir. 1969) . . . . .	10, 18
United States v. Kessler, 406 F.2d 151 at 155 (5th Cir. 1969) . . . . .	11
United States v. Macintosh, 283 U.S. 605 (1931) . . . . .	12, 24, 25
United States v. McFadden, 309 F. Supp. 502 (N.D. Cal. 1970) . . . . .	10
United States v. Seeger, 380 U.S. 163 at 185 (1965) . . . . .	16, 18, 19
United States ex rel. Sheldon v. O'Malley, 420 F.2d 1344, 1349-1950 (D.C. Cir. 1969) . . . . .	12
Welsh v. United States, 398 U.S. 333 at 340-341 (1970) . . . . .	11, 12
<i>Statutes:</i>	
Military Selective Service Act of 1967, § 6(j), 50 U.S.C. App. § 456(j) . . . . .	9
<i>Texts:</i>	
Baltimore Catechism 147-48 (Official Revised Edition; 1949) . . . . .	14
Declaration of Religious Freedom I:3, in Documents of Vatican II 681 (1966) . . . . .	13
John Tracy Ellis, American Catholicism p. 38 (Image Books Edition 1965) . . . . .	21, 22
Jerome, On Titus 3:1, 26 Patrologia Latina 626 (Ed. J.P. Migne) . . . . .	13
3 Ligouri Theologia Moralis no. 408 (1825) . . . . .	14
Pastoral Constitution on the Church in the Modern World . . . . .	4
Pope John XXIII Pacem in Terris, Part II . . . . .	5
Pope Paul VI and the Fathers of the Sacred Council Dogmatic Constitution on the Church (Lumen Gentium) November 21, 1964 . . . . .	8

(iii)

The Christmas Message of Pope Pius XII to the Whole World, 1956, The Contradiction of Our Age, The Pope Speaks, III (Spring 1957, pp. 342-344) . . . . .	5
Selective Service in Wartime, Second Report of the Director of Selective, 1941-42, 256, 258 (April 3, 1943) . . . .	26
Francisco Victoria, Relectio VI de Indis, sive De jure belli Hispanorum in barbaros 435-37 (ed. Simon in The Classics of International Law; 1917) . . . . .	14
<i>Miscellaneous:</i>	
Statistical Abstract of the United States 1970, p. 262 . . . . .	16
Selective Service System Monograph No. 11, Conscientious Objection (1950) . . . . .	19, 20

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1970

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**No. 325**

---

**LOUIS A. NEGRE,**

**v.**

**STANLEY R. LARSEN, ET AL.**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

**REPLY BRIEF ON BEHALF OF PETITIONER**

---

Argument in the government brief is divided into two propositions:

I. The government contends that Congress intended to deny exemption from military service to men prohibited therefrom by conscience formed under religious training and belief which forbids participation in wars defined as "unjust" by application of various tests fixed by their religion.

Upon examination it appears that point I of the government brief herein is contradicted by the Congressional history it refers to, and that case authority the government relies upon has been rejected both by Congress and by the Supreme Court.

II. The government asserts "all persons who are in a broad sense 'religiously' opposed to war in any form are entitled to the exemption, whether their views be a matter of church doctrine, nontheistic religious teaching or individual conscience independently developed. No religion is favored; none is discriminated against; none is established." (Brief for the United States p. 24).

Upon examination it is clear that the foregoing allegation of "neutrality" fails completely, because the government position requires any Catholic—in order to qualify for exemption from military service in the government's contention—to abandon a cardinal tenet of his religion: To wit, that the teaching of the Church (as voiced by the Pope and the Fathers and Doctors of the Church) is binding upon each Catholic in matters of faith and morals.

The government's asserted neutrality fails completely because the Catholic Church teaches that a Catholic has a moral duty to take part in wars declared by his government which comply with the tests fixed by his religion for just wars. The religious duty to participate in "just" wars is as binding upon the conscience of the Catholic as his religious duty to refuse to participate in wars he perceives in conscience as "unjust". (We place "just" and "unjust" in quotation marks, because the religious doctrine of the Catholic Church is much more precise in defining the conditions under which participation in war is proper.)

Indeed, the debate over the binding character of the teaching of the Church and the Holy Father in matters of faith and morals was one of the specific issues which brought on the Protestant Reformation in which the Protestant sects denied the religious authority of the Church and the Pope.

The Thirty Years War is only one example of protracted civil disorder brought on when governments insist upon penalizing citizens who won't confess to the religion approved by the state.

We will answer the government assertions in the opposite order from that used in the government brief, because clari-

fication of the religious issue makes it clear why Congress did not entertain the intention the government seeks to attribute to Congress: to discriminate against Catholics by denying objectors of the Catholic faith exemption from military service unless such Catholics deny that the teaching of the Church and the Pope is binding upon such Catholics.

## ARGUMENT

### I

**THE CATHOLIC CHURCH TEACHES THAT ITS MEMBERS HAVE A RELIGIOUS DUTY TO PARTICIPATE IN JUST WARS. THIS DUTY IS EQUALLY BINDING UPON THE CONSCIENCE OF THE CATHOLIC AS THE RELIGIOUS DUTY TO REFUSE TO PARTICIPATE IN UNJUST WARS. THE CONSTRUCTION OF THE SELECTIVE SERVICE ACT PROPOSED BY THE GOVERNMENT IF ACCEPTED WOULD CONSTITUTE AN INVIDIOUS DISCRIMINATION AGAINST CATHOLICS BECAUSE IT WOULD REQUIRE CATHOLICS TO ABANDON A CARDINAL TENET OF THEIR RELIGION TO BECOME ELIGIBLE FOR EXEMPTION FROM MILITARY SERVICE: NAMELY, THE GOVERNMENT DEMANDS THAT A CATHOLIC OBJECTOR DENY THAT THE TEACHING OF THE CHURCH AND THE POPE IS BINDING UPON HIS CONSCIENCE IN RESPECT OF SERVICE IN WAR.**

### A.

The government admits as it must that petitioner Negre objects to participation in any form in the war in which he was ordered to serve by reason of his Catholic religious training and belief. (Brief for the United States p. 25.) The government insists however that his objection which admittedly arises from religious training and belief should be disregarded as merely "political" because Catholic religious doctrine distinguishes between just and unjust war, and because Negre subscribes to belief in the Catholic religion.

In fact Negre's disqualification from conscientious objection status under the government's contention arises precisely because Negre stubbornly persists in the position:

"Petitioner stated that he accepted 'the teaching of His Holiness Pope Paul VI as announced in the Pastoral Constitution as binding upon [his] conscience \* \* \*' (N. App. 10)." (Brief for the United States p. 6.)

The government purports to misunderstand the statement at the end of Negre's application:

"At the end of his application, petitioner added, without any elaboration, that at present 'he could not conceive of participation in any war.' (N. App. 14)." Brief for the United States p. 8.

The elaboration is obvious from the very passage of the Pastoral Constitution on the Church in the Modern World cited by Negre, to wit paragraph 79 which states:

"Certainly war has not been rooted out of human affairs. As long as the danger of war remains and there is no competent and sufficiently powerful authority at the international level, governments cannot be denied the right to legitimate defense once every means of peaceful settlement has been exhausted. Therefore, government authorities and others who share public responsibility have the duty to protect the welfare of the people entrusted to their care and to conduct such grave matters soberly.

\* \* \* \* \*

Those who are pledged to the armed service of their country as members of its armed forces should regard themselves as agents of security and freedom on behalf of their people. As long as they fulfill this rule properly, they are making a genuine contribution to the establishment of peace."

Thus, "the teaching of His Holiness Pope Paul VI as announced in the Pastoral Constitution [and] binding upon [Negre's] conscience" does not proscribe all war but sanctions "wars of legitimate defense once every means of peaceful settlement have been exhausted."

Pope Pius XII is even more explicit that a Catholic has a religious duty to comply with the command of the state

and participate in wars in which the theological tests (often subdivided into five) fixed by the Catholic religion for just war have been met:

"There is no longer room for doubt concerning the aims and methods which rely on tanks, when these latter noisily crash over borders and sow death in order to force civilian peoples into a pattern of life which they explicitly detest; when—destroying, as it were, the stages of possible negotiation and mediation—the threat of using atomic weapons is employed to gain certain demands, be they justified or not.

"It is clear that in present circumstances there can be verified in a nation a situation, wherein, after every effort to avoid war has been expended in vain, war—for effective self-defense and with the hope of a favorable outcome against unjust attack—could not be considered unlawful.

"If therefore, a body representative of the people and a government—both having been chosen by free elections—in a moment of extreme danger decide, by legitimate instruments of internal and external policy, on defensive precautions and carry out the plans which they consider necessary, they do not act immorally. Therefore a Catholic citizen cannot invoke his own conscience in order to refuse to serve and fulfill those duties the law imposes. On this matter we are in perfect harmony which Our Predecessors, Leo XIII and Benedict XV, who never denied that obligation, but lamented the headlong armaments race, and the moral dangers accompanying barracks life, and urged, as We do likewise, general disarmament as an effective remedy." The Christmas Message of Pope Pius XII to the Whole World, 1956, *The Contradiction of Our Age, The Pope Speaks*. III (Spring 1957, pp. 342-344).

The theological basis of the Catholic duty to obey the command of the state and participate in a just war is clearly explicated by Pope John XXII in Part II of *Pacem in Terris* from which Negre cites paragraph 51.



"46. Human society can be neither well-ordered nor prosperous unless it has some people invested with legitimate authority to preserve its institutions. . . . These however derive their authority from God, as St. Paul teaches in the words, Authority comes from God alone. [Rom. 13, 1-6] These words of St. Paul are explained thus by St. John Chrysostom: \* \* \* What I say is, that it is the divine wisdom and not mere chance, that has ordained that there should be government, that some should command and others obey.

\* \* \* \* \*

"50. \* \* \* When in fact, men obey their rulers it is not at all as men that they obey them, but through their obedience it is God, the provident Creator of all things, Whom they reverence, since He has decreed that men's dealings with one another should be regulated by an order which He himself has established."

Continuing, John XXIII taught, and Negre learned:

"51. Since the right to command is required by the moral order and has its source in God, it follows that if civil authorities pass laws or command anything opposed to the moral order and consequently contrary to the will of God, neither the laws made nor the authorizations granted can be binding on the consciences of the citizens, since God has more right to be obeyed than men."

Negre's legal problem vis-a-vis the government is not that Negre foresees some war coming up in which he conceives he might participate because Negre asserted without contradiction:

"At present I feel that I could not conceive of participation in any war."

The defect in Negre's views in the government's analysis is that he accepted "the teaching of His Holiness Pope Paul VI as announced in the Pastoral Constitution as binding upon [his] conscience \* \* \*." (N. App. 10) cited in Brief for the United States p. 6. And the particular trouble with Pope Paul VI and the Pastoral Constitution is that noted by

the hearing officer, namely, that Paul VI and the Fathers of the Sacred Council can conceive of just wars and that Negre if he remains a Catholic will have a duty as a Catholic to participate in any such wars if they ever occur. The Army hearing officer observed:

"Pope Paul is also concerned with the 'type' of war. \* \* \* The war that concerned the Pope was a war of aggression rather than one of defense. He felt that destruction of cities was a crime against God if it would serve no purpose. The war effort must not be indiscriminate. Pope Paul did not pass on the morality of a defensive war or the indiscriminate bombing of military targets." (N. App. 38-390.)

The hearing officer is wrong in his last sentence because the Pastoral Constitution expressly sanctions defensive war conducted by proper means, and expressly proscribes indiscriminate bombing and destruction visited upon civilian populations. But although the phrasing of Captain Van Wert, the hearing officer, in the last sentence was not quite right theologically, Captain Van Wert was correct in capturing the theological gist of the teaching of Paul VI in the Pastoral Constitution that a Catholic has a religious duty to participate and unjust wars in which he has a religious duty to refuse to participate.

Negre thus finds himself in the position that he personally cannot presently conceive of participation in any war, but in all humility he accepts the teaching of the Catholic Church and its Supreme Pontiff, Paul VI, that a just war may occur under modern conditions and that if it does so he has a religious duty to participate therein.

The government assertion that the law is neutral among religions implies in that statement that Negre may render himself eligible for conscientious objector status by the simple expedient of denying that "the teaching of his Holiness Pope Paul VI as announced in the Pastoral Constitution [is] binding upon [Negre's] conscience \* \* \* (N. App. 10)." Brief for the United States p. 6.

Negre is of course theologically free to deny that the teaching of the Fathers of the Sacred Council as confirmed by Pope Paul VI is binding upon his conscience. The only theological difficulty with doing so is that Negre is no longer a Catholic if he denies that the teaching of the Pope is binding upon his conscience.

The binding character of the teaching of the Pope was reaffirmed so recently as November 21, 1964 in the Dogmatic Constitution on the Church (*Lumen Gentium*) by Paul VI and the Fathers of the Sacred Council:

"25. \* \* \* In matters of faith and morals, the Bishop's speech in the name of Christ and the faithful are to accept their teaching and adhere to it with a religious assent of soul. This religious submission of will and of mind must be shown in a special way to the authentic teaching authority of the Roman Pontiff, even when he is not speaking *ex cathedra*. That is, it must be shown in such a way that his supreme magisterium is acknowledged with reverence, the judgments made by him are sincerely adhered to, according to his manifest mind and will."

The teaching of the Pope is absolutely binding on all Catholics when he speaks *ex cathedra*:

"This is the infallibility which the Roman Pontiff, the head of the college of bishops, enjoys in virtue of his office, when as the supreme shepherd and teacher of all the faithful, who confirms his brethren in their faith (cf. Lk.22.32), he proclaims by a definitive act some doctrine of faith or morals."

The foregoing religious doctrine is not set out to persuade the court that it is theologically true or theologically false.<sup>1</sup>

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<sup>1</sup>"The religious views expoused by [petitioner herein] might seem incredible if not preposterous, to most people but if those doctrines are subject to trial before a [hearing officer of the Army or this court] charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake

Rather, we set out the foregoing doctrine to demonstrate simply that the government's assertion is untenable that under its construction of section 6(j) of the Selective Service Act "No religion is favored; none is discriminated against; none is established." (Brief for the United States p. 24).

The blunt fact is that if the Solicitor General's construction of section 6(j) is accepted by this court, none of this nation's 44 million odd Catholics is eligible for exemption from military service as a conscientious objector: Either the young man accepts the teaching of Vatican II, and the Popes that just wars may occur in which he has a duty to participate, or else the young man denies the authoritative teaching of the Popes and the Fathers of the Sacred Council. In the latter case the young man is no longer a Catholic, but has become a Protestant (namely one who protests the authoritative teaching of the Pope) as was pointed out by the Council of Trent in 1545-63.

It is up to this court to determine whether the First Amendment to the Constitution permits the blatant form of religious discrimination proposed by the government in the present case

## B.

Despite the uncontradicted and incontrovertible evidence that Negre's conscientious objection is rooted in his Catholic training and belief, the Army disapproved Negre's application for discharge upon the ground that his objection to service was based upon a "personal moral code." (N. App. 41). It is difficult to imagine what ground the Army could have had for such a determination unless it was an erroneous preconception that Catholicism is a personal moral code rather than a religion. Cf. *United States ex rel. Healy v. Beatty*, 424 F.2d 299 (5th Cir. 1970).

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that task, they enter a forbidden domain." *United States v. Ballard*, 322 U.S. 78 at 87 (1944).

Judge Zirpoli in March, 1969 sustained the Army's decision denying discharge. (N. App. 48). Less than a year later, however, Judge Zirpoli concluded that the discrimination against Catholics under the government's interpretation of section 6(j) violated Free Exercise, Due Process, and the No Establishment Clauses of the Constitution. *United States v. McFadden*, 309 F. Supp. 502 (N.D. Cal. 1970), pending on jurisdictional statement, No. 422 this Term.

The Ninth Circuit took pains to reject Negre's contention that his objections were based upon religious training and belief:

"Our analytical view of the record reveals that appellant has a personal moral code based upon his sociological and philosophical views, rather than a conscientious objection to participation in war in any form by reason of religious training and belief." (N. App. 51).

The government herein makes the same sort of conclusory assertion:

"Opposition to a particular war necessarily involves a political judgment, [citing a law review article] an individual conclusion that the policy adopted by the duly elected government is wrong at a certain time in relation to a particular area of operations. See *United States v. Kauten*, supra, 133 F.2d at 707. While the personal response to that determination may well be religiously and conscientiously motivated, it rests in the first instance on a decision that is political and particular. See generally, Comment, 34 U. Chi. L. Rev. 79, 102 (1966)." Brief for the United States pp. 24-25.

The government's assertion that Negre's beliefs are solely political fails the tests of logic, of history, and of support in the record.

In logic a total objector equally with a selective objector certainly will make the "judgment, an individual conclusion that the policy adopted by the duly elected government is wrong at a certain time in relation to a particular area of

operations." Any individual who concludes that a war to which his attention is directed violates the commands of God can scarcely be expected to applaud the political decision of his country to participate in the war. As the Fifth Circuit remarked:

"... disapproval of war in Viet-Nam or any other place is certainly consistent, rather than inconsistent, with conscientious objection to armed conflict. Really, if Kessler had said that he was a conscientious objector but nevertheless approved of any war this would have been such an inconsistency as to have undermined the sincerity of his religious objection to all wars." *United States v. Kessler*, 406 F.2d 151 at 155 (5th Cir. 1969).

A national decision to go to war is as much a political decision for the total pacifist as it is for the selective objector. Indeed many political decisions have a religious significance: For example the political decision to feed the hungry also expresses a religious duty of charity; a political decision to exterminate all members of a race or nationality would violate the religious views of many persons. The question under section 6(j) therefore is not whether the government decision to engage in war is political, but whether the individual's objection is based upon his religious training and belief, or arises solely from his politics. As noted in *Welsh v. United States*, 398 U.S. 333 at 340-341 (1970), the beliefs upon which objection is based must "function as a religion in [the individual's] life," and the exemption does not extend to those:

"Whose objection to war does not rest *at all* upon moral, ethical, or religious principle, but instead rests solely upon considerations of policy, pragmatism, or expediency." [Emphasis added]

Indeed every court that has considered the question including *Berman*, *infra*, has concluded that political, sociological, philosophical or personal moral objections to war do not

disqualify the objector who also has a religious basis for his objection to participation in war.<sup>2</sup>

The test Congress set in adopting section 6(j) was to recognize the individual's conscience where it reflected his view of obedience to God or the functional equivalent of such belief. Thus, the 1948 Act specifically adopted the definition of religion from Chief Justice Hughes dissent in *United States v. Macintosh*, 283 U.S. 605 at 633 (1931): "The essence of religion is a belief in a relation to God involving duties superior to those arising from any human relation." Congress further followed the explication of Justice Hughes' opinion in *Macintosh* from *United States v. Berman*, 156 F.2d 377 (9th Cir. 1946) that:

"... his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute." 156 F.2d at 381.

The court concluded:

"belief . . . based entirely upon a philosophical, social or political policy . . . does not entitle him to exemption from military duty." 156 F.2d at 382.

Thus, the man is not exempted from military service who concedes that the war does not violate any law of God or the functional equivalent in his life of the law of God, even though such individual may assert his belief that the war is unpragmatic, or that the war is inexpedient either for the country or for himself personally.

The Catholic's religious duty to obey conscience is scarcely a new doctrine of the Church. When told to stop preaching by the Sanhedrin, to which he was by law sub-

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<sup>2</sup>*Welsh v. United States*, 389 U.S. 333 at 340-341 (1970); *Packard v. Rollins*, 422 F.2d 525, 527 (8th Cir. 1970); *Pitcher v. Laird*, 421 F.2d 1272, 1280 (8th Cir. 1970); *United States ex rel. Sheldon v. O'Malley*, 420 F.2d 1344, 1349-50 (D.C. Cir. 1969); *United States v. Haughton*, 413 F.2d 736, 742 (9th Cir. 1969); *United States ex rel. Brooks v. Clifford*, 409 F.2d 700, 708 (4th Cir. 1969).

ordinate, "Peter replied for himself and the apostles, 'We must obey God rather than men.'" Acts of the Apostles 5:29. This contention that where conscience is in issue God must be obeyed has been axiomatic in Catholic teaching in every age.

Typical is the statement in the fourth century by St. Jerome, the author of the Latin Bible, who wrote, "If what the emperor and presiding officers command is good, obey the will of the commander. But if it is evil and against God, answer him with those words from the Acts of the Apostles, 'It is necessary to obey God rather than men.'" Jerome, *On Titus* 3:1, 26 *Patrologia Latina* 626 (Ed. J. P. Migne).

The obligation to follow conscience was put in positive terms by Pope Paul VI and the Fathers of the Second Vatican Council:

"On his part, man perceives and acknowledges the imperatives of the divine law through the mediation of conscience. In all his activity a man is bound to follow his conscience faithfully, in order that he may come to God, for whom he was created." *Declaration on Religious Freedom* 1:3, in *Documents of Vatican II* 681 (1966).

Nor is the duty of the common soldier to refuse participation in a war which does not meet the tests of his religion anything new in the Catholic religion.

The classic exposition of just war theory is that of Francisco Victoria, the Dominican master of the University of Salamanca from 1520 to 1540 and pioneer in international law. Victoria asks: "Are subjects bound to examine the cause for a war or may they fight without applying any diligence to this matter, as court officers carry out the decree of a judge without other examination?" Victoria begins his answer by pointing out, "If a subject is clear as to the injustice of a war he may not lawfully fight, even at the prince's command. This is obvious, for it is not lawful to kill the innocent by any authority whatsoever; and in



this case the enemy are the innocent. Therefore it is not lawful to kill them."

Victoria goes on to say that certainly senators and counselors of the prince are bound to examine the cause of the war, and then he asks if lesser folk are similarly obliged. He concludes that by reason of impossibility they are not bound personally to investigate the causes of a war, but he continues: "Nonetheless there can be such evidence and indicia of the injustice of a war that ignorance will not excuse even subjects of this kind if they fight." If they could be excused by looking away from the facts, so could the soldiers who crucified Christ. Victoria concludes to an obligation in this kind of case to look at the justice of the cause and not to fight in an unjust war. *Relectio VI de Indis, sive De jure belli Hispanorum in barbaros* 435-37 (ed. Simon in *The Classics of International Law*; 1917).

The most influential of all Catholic moral theologians, St. Alfonso de' Ligouri (1696-1787), treats of the soldier's duty under the general heading of the Fifth Commandment, "You shall not kill." He is categorical as to the obligation of the soldier who becomes certain that the war in which he is engaged is unjust: "A soldier, understanding that the war which he is in is unjust, cannot be absolved unless he wills to obtain as quickly as possible his dismissal, and meanwhile abstains from hostile acts." 3 Ligouri *Theologia moralis* no. 408 (1825). In other words, a soldier in this position is unable to receive the sacrament of Penance and the sacrament of the Eucharist unless he is attempting "as quickly as possible" (*quamprimum potest*) to obtain his release from the army.

In the standard *Baltimore Catechism*, the question is put, "What is the fifth commandment of God?" The answer given is "The fifth commandment of God is: Thou shalt not kill." Developing the answer, the Catechism then makes an exception for "a soldier fighting a just war." *Baltimore Catechism* 147-48 (Official Revised Edition; 1949).

The teaching of the Catholic church has been consistent for nearly two thousand years in affirming the primary duty of man to follow conscience as the voice of God, and to refuse to kill where taking life violates conscience. If in the heat of defense of a much-criticized war the government can prevail with its contention that these teachings of the Catholic church are "political" rather than "religious," one can only wonder what life is left in the freedom of religion guaranteed by the First Amendment which has been the pride of the American commonwealth for nearly two centuries.

### C.

Failing in its contentions that the teaching of the Catholic church of obedience to conscience is "political" and not religious, and that coercing objectors into disclaimer of obedience to the teaching of the Church and the Pope is not discriminatory against Catholics, the Brief for the United States summons up a number of supposed difficulties which are said to justify government discrimination against Catholic conscientious objectors in administration of the draft.

First the government brief asserts (p. 26) that the exemption would be hard to administer because the views of individuals would be "changeable". Friends are free to change their mind and participate in war, and many have taken part in war. Indeed the subscribers to the Oxford Oath of the 1930's who refused participation in World War II were by all accounts far fewer than the subscribers who changed their mind and took part in the war in the front lines. Then the selective objector is charged with being "subjective." (Brief for the United States p. 26). That observation is a tautology: The Friend's adoption of his religion is as "subjective" as the Catholic's. Indeed, it is more subjective insofar as traditional Friend teaching is that light comes directly from God to the individual, rather than being refracted through an institutional church

which announces doctrines binding upon all of the faithful.

Next the government speculates that local boards and the military will be required "to defer to any individual's unexplained assertion (on sincere 'religious' grounds) that he chooses not to serve . . ." (Brief for the United States p. 27). *United States v. Seeger*, 380 U.S. 163 at 185 (1965) dismissed that contention:

"But we hasten to emphasize that while the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact—a prime consideration to the validity of every claim for exemption as a conscientious objector. The Act provides a comprehensive scheme for assisting the Appeal Boards in making this determination, placing at their service the facilities of the Department of Justice, including the Federal Bureau of Investigation and hearing officers."

Finally, the government speculates that recognizing Catholic conscientious objection, and that of others who object on religious grounds to unjust wars as defined in their religion "would necessarily hinder the achievement of the basic objection of the Selective Service System—to raise necessary military manpower for the national defense . . . ." (Brief for the United States, p. 28).

The foregoing contention ignores the historical fact that Catholics, though bound by the just war doctrine and obedience to conscience taught by their Church for millenia, have not been notably persuaded in any numbers that their government embarks upon unjust wars. Of the 21,785,000 men of draft age in 1969 only 25,000—.11%—were classified as conscientious objectors. *Statistical Abstract of the United States 1970* p. 262. By any rational estimate the number of men available and willing to serve.

President Johnson reported to Congress in 1967:

"A decade ago, about 70% of the group eligible for duty had to serve with the Armed Forces to meet our military manpower need.

"Today, the need is for less than 50%, and only about one-third or less of this number must be involuntarily inducted—even under the conditions of war." 111 Cong. Rec. 5404 at 5476.

If great numbers of men refuse military service, Congress may want to consider revoking the conscientious objector exemption altogether.<sup>3</sup>

As an afterthought the government brief suggests that if the courts recognize Catholic or selective conscientious objection, the next thing to happen will be a general refusal to pay taxes. The short answer is that Congress has seen fit to exempt religious objectors to participation in war, and has not seem fit to exempt from tax payments those who have religious objection to paying taxes if any such there are. By contract legislators from colonial times have consistently recognized the religious claim to exemption from military service to those opposed to taking life. The reasons for the distinction are self evident: The commandment "you shall not kill" (sometimes translated "you shall not murder") is taken in Judea-Christian religions as divine revelations—a command directly from God. Life is viewed as given by God. The taking of life is viewed as one of the most serious acts conceivable, placing man in jeopardy of violating God's directly revealed word.

Congress has always recognized that granting recognition of important religious claims as an accommodation of freedom of religion does not in logic or experience compel Congress to exempt religious persons from each and every

<sup>3</sup> If most persons refuse military service, some members of government might consider whether the national policy so rejected by a majority of young men correctly reflects the consensus of the people who are sovereign in a democracy.

law passed by Congress. Moreover, where legislatures have exempted churches from paying taxes, it would be manifestly unconstitutional to deny exemption to the Catholic Church for teaching just-war doctrine while extending such exemption to churches which teach toward passivism, or which teach toward obedience to the state.

As will appear in the next section the founding fathers and Congress have consistently recognized conformity to define command in refusing to take part in war as a proper subject of religion deserving of recognition by government.

## II. NOTHING IN THE HISTORY OF THE SELECTIVE SERVICE ACTS SUPPORTS THE INTENTION OF CONGRESS ASSERTED BY THE GOVERNMENT HEREIN TO DISCRIMINATE AGAINST CATHOLIC CONSCIENTIOUS OBJECTORS.

The government contends that Congress intended to deny exemption from military service to men prohibited therefrom by conscience formed under religious training and belief which forbids participation in wars defined as "unjust" by application of various tests fixed by their religion.

In support of this proposition the government relies solely (with one exception) upon the history set out in the brief for the government in *United States v. Seeger*, 380 U.S. 163 (1965). Upon reading that brief the history contradicts the government position herein. For case authority the government relies upon *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943) which Congress in 1948 rejected in favor of *United States v. Berman*, 156 F.2d 377 (9th Cir. 1946). The Supreme Court in *Sicurella v. United States*, 348 U.S. 385 (1955) likewise rejected the *Kauten* construction that the conscientious objector must object to "war in any form" and held it sufficient that the conscientious objector object to "participation in any form" in war.

Upon examination it appears that point I of the government brief herein is contradicted by the Congressional history it refers to, and that the case authority the government relies upon has been rejected both by Congress and by the Supreme Court.

With the exception of Senator LaFollette's proposal in World War I to exempt persons of German and Austrian ancestry with "conscientious objections" against going "into service to fight against their own kith and kin \* \* \* " (Brief for the United States p. 16), the government relies solely for its Congressional history upon the government brief in *United States v. Seeger*, No. 50 O.T. 1964, and *Selective Service System Monograph No. 11, Conscientious Objection* (1950).

But the government brief in *United States v. Seeger* at page 35 concluded:

"The core of the exemption for conscientious objectors is the unwillingness of the Congress, speaking the true will of the American people, to punish as a criminal a man who refuses to perform military service in obedience to what he believes is the command of God transmitted by divine revelation. The unwillingness of the American people to compel a man to disobey a divine command and yield to a human obligation imposed by government is older than the Nation."

Proceeding to the history outlined at pages 41-72 we find that a number of colonies jailed, or subjected to heavy taxes or fines those who refused to render military service. When these measures failed to persuade religious objectors to disobey the word of God as perceived in their conscience, a number of colonies recognized religious conscientious objection such as Massachusetts in 1661, Rhode Island in 1673 and Pennsylvania in 1757. (Id at 42).

The Continental Congress in 1775 resolved:

"As there are some people who from Religious Principles cannot bear Arms in any case, this Congress intend no Violence to their Consciencies, but earnestly recomment it to them to Contribute Liberally, in this time of universal calamity, to the relief of their distressed Brethren in the several Colonies, and to do all other services to their oppressed country, which they can consistently with their Religious Principles." *Selective Service System Special Monograph* No. 11, 1 Conscientious Objection 33-34 (1950).

The Solicitor General fastens upon the phrase "people who from Religious Principles cannot bear Arms in any case" as evidence of an intent to discriminate against Catholics and other just war objectors. (Brief for the United States p. 15).

But he cites no debate, correspondence or evidence to support that interpretation. In the first place the Continental Congress did not limit its resolution to those "who from Religious Principles cannot bear Arms in all cases of war, present or future, real or speculative . . . ."

It is more to the point however to remark the actual history of religious toleration in the colonies. For the colonial assemblies were well aware how to write religious intolerance into law. The Massachusetts Bay Colony hanged four Friends who refused to desist from teaching their religion. In Maryland the Baron Baltimore (a Catholic) in April 1649 Adopted the Act of Toleration which provided in part:

"And whereas the inforceing of the conscience in matters of Religion hath frequently fallen out to be of dangerous Consequence in those commonwealths where it hath been practised . . . Be it Therefore . . . enacted . . . that noe person or psons [sic] whatsoever within this Province . . . professing to believe in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced

for or in respect of his or her religion nor in the free exercise thereof." Quoted in John Tracy Ellis, *American Catholicism* p. 38 (Image Books Edition 1965).

But the American colonies could not remain immune from the bitter religious warfare taking place in Great Britain. In 1654 the Puritans took control of the Maryland assembly, repealed the Act of Toleration and outlawed the Catholics. Ten Catholics were condemned to death, four were executed, the houses and estates of the Catholic clergy were taken, and the Catholic priests were forced to flee to Virginia. *Ibid.* Catholics in New York suffered similar discrimination. *Id* at 41. Catholics were subjected to penal laws in eight out of the thirteen colonies. The Continental Congress in 1774 adopted the anti-Catholic Suffolk Resolves, and wrote to George III their astonishment that Parliament by the Quebec Act of 1744 established for Canada the Catholic religion "that has deluged your island in blood, and dispersed impiety, bigotry, murder and rebellion through every part of the world." *Id.* at 45.

What carried the day for religious toleration was not a sudden access of insight into the ethical desirability of religious toleration. Rather more practical considerations were involved. General Washington was seeking the assistance of Canadians, Catholics, and in November, 1775 wrote his troops who prepared to burn the pope in effigy on Guy Fawkes Day:

"To be insulting to their Religion, is so monstrous as not to be suffered or excused." *Id* at 45-46.

Father John Carroll, later the first Catholic bishop in the United States, was deputed by the Continental Congress to seek help from the Canadians. The colonies signed an alliance with France, a Catholic country, in 1778; and Catholics served in the Continental Congress from Maryland (Daniel Carroll) and Pennsylvania (Thomas Fitzsimmons). *Id* at 47.



The same two Catholics served in the Constitutional Convention and were rather outspoken in favor of religious toleration as ultimately adopted in the First Amendment. President Washington wrote Father John Carroll in 1790 upon his departure to England to be consecrated as the first American bishop. Washington expressed his hope that America would be among the foremost nations of the world in respect of religious tolerance, and concluded with the pragmatic observation:

“And I presume that your fellow citizens will not forget the patriotic part which you took in the accomplishment of their Revolution, and the establishment of their government; nor the important assistance which they received from a nation in which the Roman Catholic Religion is professed.”  
Id at 48-49.

It was therefore most improbable that the First Amendment drafted just at the time when Catholics first had attained general toleration in the colonies was intended to sanction punishment of Catholics—in the field of military service or any other—merely because the Catholics followed their traditional acceptance of the authority of the teaching of the Pope and the Church in matters of faith and morals.

Continuing in American history, anti-Catholic sentiment recurred from time to time as in the Know Nothing Party and the American Protective Association. In a year marred by anti-Catholic riots, Abraham Lincoln declared himself for religious tolerance by offering a resolution at a Whig Meeting:

“Resolved, that the guarantee of rights of conscience, as found in our Constitution, is most sacred and inviolable, and one that belongs no less to the Catholic, than to the Protestant; that all attempts to abridge or interfere with these rights, either of Catholic or Protestant, directly or indirectly, have our decided disapprobation and shall ever have our most effective opposition.” John Tracy Ellis, *American Catholicism* p. 69.

In the Civil War pragmatism again joined with principle in support of religious toleration. President Lincoln commissioned Archbishop Hughes of New York to go to France to attempt to persuade Napoleon III to neutrality. The Confederacy commissioned Bishop Lynch of Charleston to visit Europe with the opposite intent. *Id.* at 95-96. Thus, in the Civil War neither views of President Lincoln in favor of religious toleration, nor the political realities of the moment suggested any intent to discriminate against Catholic conscientious objectors because their Church taught a just war doctrine rather than total pacifism.

In World War II Congress confined its exemption to members "of any well-recognized religious sect . . . whose existing creed . . . forbid its members to participate in war in any form . . ." 40 Stat. 78. Again, Congress did not display any intent to compel Catholic objectors to violate their duty of obedience to God as perceived in conscience. Rather Congress was concerned to distinguish the bona fide religious objector "without opening the doors to every slacker who, without any sincere and long-established convictions might declare also his so-called 'conscientious scruples' in order to avoid service." 55 Cong. Rec. 1478-1479.

In the present case, Negre was born, baptised, raised and educated as a Catholic and was found by the Army hearing officer to be very devout. His Catholic convictions are both "sincere and long-established."

Turning to the present section 6(j) of the Selective Service Act, Solicitor General Cox noted in his Seeger brief at pp. 70-71:

"[*Berman v. United States*, 157 F.2d 377, certiorari denied, 329 U.S. 795] reiterated this point by quoting (*id.* at 381) from the dissent of Chief Justice Hughes (with Justices Holmes, Brandeis, and Stone concurring) in *United States v. Macintosh*, 283 U.S. 605, 633:

'The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.'

"Both the *Berman* and *Kauten* decisions were before Congress when the present statute was adopted in 1948. Congress signified that *Berman* constituted the correct interpretation of its views by adopting the definition of 'religious training and belief' which the Ninth Circuit had borrowed from *Macintosh* and saying, as to the exemption provision (S. Rep. No. 1268, 80th Cong., 2d Sess. 14):

'This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relation to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *United States v. Berman*, 156 F.2d 377, certiorari denied, 329 U.S. 795.) [Emphasis added].'

The present Solicitor General seeks to avoid the fact that the present section 6(j) was virtually copied from Chief Justice Hughes' dissent in *Macintosh* by confining his discussion of the case to a footnote and saying that *Macintosh* was an immigration case. (Brief for the United States p. 19, footnote 12).

That Chief Justice Hughes expressed his views in an immigration case, *Macintosh*, is hardly a distinction since Congress saw fit to adopt his views by copying his language in the Selective Service Act of 1948. Within the immigration field the Supreme Court in *Girouard v. United States*, 328 U.S. 61 (1946) overruled the majority opinion in *Macintosh*.

Chief Justice Hughes' opinion in *Macintosh* was highly sensitive to the religious issue. The crux of his opinion is the long history of Congressional recognition that "in the forum of conscience, duty to a moral power higher than the state has always been maintained. \* \* \* the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." 283 U.S. 605 at 633.

Chief Justice Hughes does not in his opinion share the government's present contention, that obedience to God by the Catholic refusing military service should be punished while obedience to God by a member of a sect asserting total pacifism is to be sanctioned. Rather, Chief Justice Hughes emphasizes:

"It goes without saying that it was not the intent of Congress in framing the oath to impose any religious test." 283 U.S. at 631.

Continuing, Chief Justice Hughes declared:

"Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. \* \* \* there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification." 283 U.S. at 635.

The government in the present case thus finds itself making the curious contention that when Congress adopted the language of Chief Justice Hughes in *Macintosh* in the 1948 Act, that Congress was so inept that it intended the result opposite that proposed by Chief Justice Hughes.

Finally, we note that the Selective Service in 1943 recognized the religious basis of Catholic conscientious objection as deriving from conscience:

"We recognize at the basis of conscientious objection, the very simple statement of the New Testament: 'It is better to obey God rather than man' It might be invincible ignorance or misunderstanding or emotion, but if the individual regards his acts as his answer to a call from God or as God's will, in accordance with his religious training and belief, then the Nation in accordance with its tradition, feels bound to recognize it.

\* \* \* It was argued, for example, that a member of the Catholic church could not possibly have a basis for conscientious objection.

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"After much consideration we adopted a more liberal view, based upon a conclusion that the definitions of religion and the variety of religious experience are so nearly infinite in number as to make futile any attempt to say whether this or that one met the law. The practical effect of this decision was to say that conscientious convictions held by a man reared in the environment of a religious civilization and exposed, if only subjectively, to its ethical concepts, have their roots in the same soil from which spring religious convictions, and furnish evidence from which may be drawn the inference that he recognizes a Deity or a power above and beyond the human. This view has prevailed." Selective Service in Wartime, Second Report of the Director of Selective Service, 1941-42 256, 258 (April 3, 1943)."

The foregoing passage is instinct with recognition of the dilemma of the Catholic objector that despite his customary duty of obedience to the state, he has an overriding religious duty to follow his conscience and to refuse military service in an unjust war, even though others judge him to be objectively mistaken. In such a case where the individual has carefully and prayerfully formed his conscience, the Church teaches that the individual is free from moral fault, and his objective error is not judged by God to be error, but rather is excused as invincible ignorance.

The generous spirit of religious tolerance recognized by General Hershey and the Selective Service System in 1943 in an hour of supreme national crisis conforms much better to the great American tradition of a free people in a free country, than the rather ungenerous interpretation asserted by the government in the present case.

## CONCLUSION

For the reasons stated, section 6(j) should be construed to grant Catholic objectors exemption from military service despite the Catholic teaching of the just war doctrine. If section 6(j) will not bear that construction, then it should be declared unconstitutional.

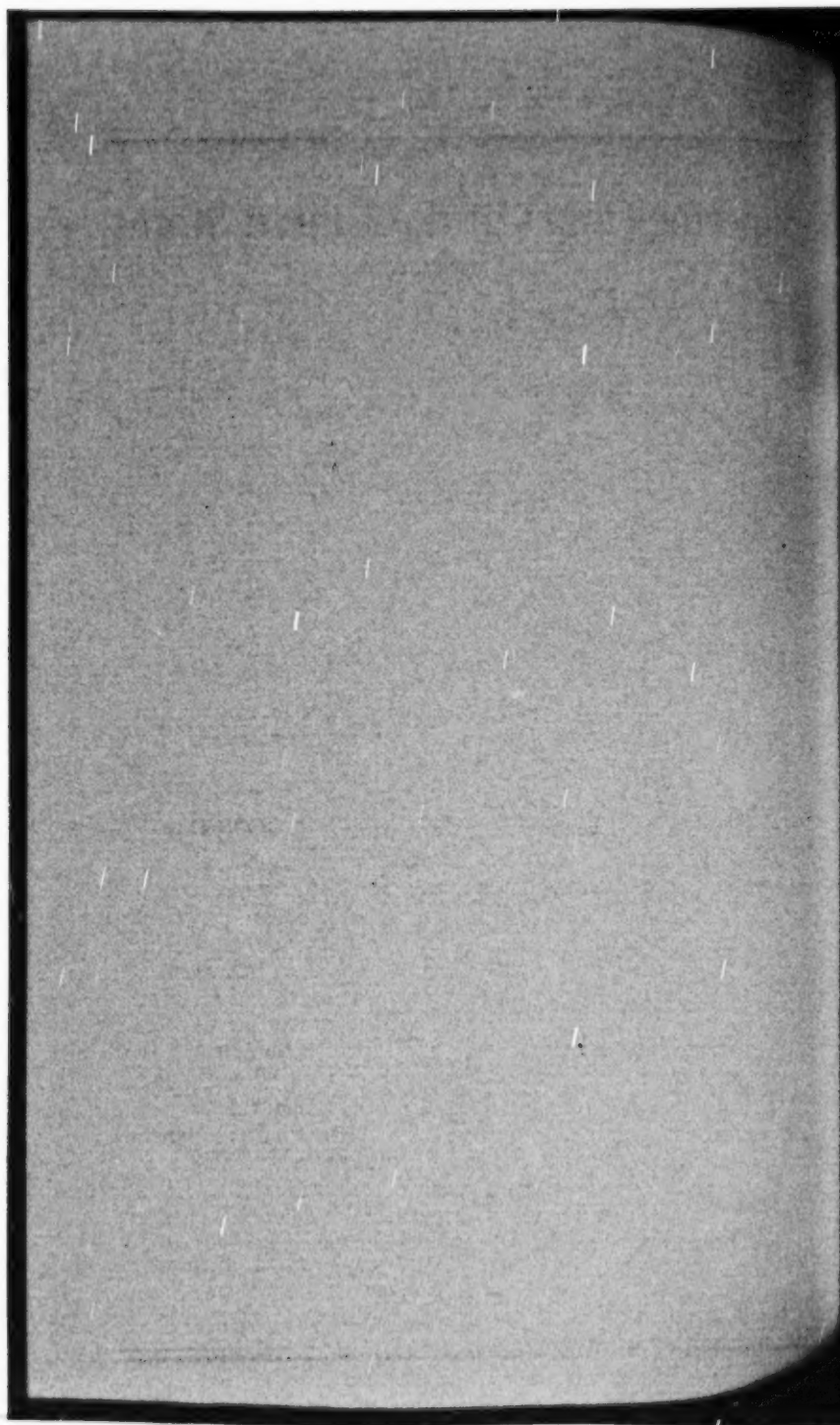
Dated: December, 1970.

Respectfully submitted,

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No. 325

Vide No. 85 for  
motion & Brief of  
George T. Altman



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# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 325

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LOUIS A. NEGRE

VS.

STANLEY R. LARSEN, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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## Petition for Rehearing

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# In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
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## **Petition for Rehearing**

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Petitioner Louis A. Negre seeks rehearing because the decision of the court rests upon assertions of fact squarely contrary to the uncontradicted findings of fact in the record in the present case.

The majority opinion in connection with free exercise of religion rests upon a proposition which is simply untrue:

“The conscription laws, applied to such persons [“objectors to particular wars”] as to others, are not designed to interfere with any religious ritual or practice, and *do not work a penalty against any theological position.*” (Emphasis added) Slip opinion page 25.

To the contrary, Negre is denied discharge from the military service solely because he is unwilling to renounce his theological position: To wit, the position that the teaching of the Catholic Church and its Supreme Pontiff is binding upon Negre as a Catholic in matters of faith and morals.

The Army hearing officer fully accepted Negre's statement:

"At present I feel that I could not conceive participation in any war." R. 14.

Indeed, the Army hearing officer expressly found:

"It cannot be doubted that PFC Negre is opposed to killing if he has to be directly involved in it." R. 39.

"... PFC Negre is conscientiously opposed to the use of force if that force has to be asserted by him." R. 40.

Negre thus falls squarely under the test of the majority opinion:

"In the draft area for 30 years the exempting provision has focused on individual conscientious belief, not on sectarian affiliation. The relevant individual belief is simply objection to all war, not adherence to any extraneous theological viewpoint." Slip opinion page 16.

Negre is an objector to "all killing in war". Slip opinion page 23.

Negre is to be denied the privilege of discharge from Army (or by identical reasoning subjected to punishment for disobedience of orders) not because his own belief which is: "At present I feel I could not conceive participation in any war." R. 14. Rather Negre is to be subjected to disability or punishment solely because he will not renounce the truth of the teaching of the Catholic Church, its Fathers, Doctors and Popes, that wars indeed may exist which are just wars in which a Catholic has a duty to participate if duly called by his government.

The majority opinion declares :

"Unwillingness to deny the possibility of a change of mind in some hypothetical future circumstances, may be no more than humble good sense, casting no doubt on the claimant's present sincerity of belief." Slip opinion pages 10-11.

Nothing could more precisely describe Negre's beliefs than the passage just quoted from the majority opinion: Negre's present sincerity of belief was not denied. Rather the Army hearing officer expressly found :

"His sincerity is shown by his willingness to be incarcerated for his beliefs." R. 37.

Under the majority opinion however Negre is to be subjected to disability solely because he will not disavow the teaching of his church that under "hypothetical future circumstances" Negre's participation in war would not be sinful.

The hypothetical future circumstances may never in fact occur and Negre may never find a war in which his religious beliefs will permit him to participate. Cardinal Ottaviani, a Catholic theologian stated "modern wars can never fulfil those conditions which (as we stated earlier on in this essay) govern — theoretically — a just and lawful war." (Quoted by dissent of Justice Douglas, slip p. 4).

Thus, Negre is subjected to disability or punishment solely for his belief in religious doctrine: To wit the Catholic doctrine on war. St. Thomas Aquinas asks: "Whether It Is Always Sinful to Wage War?" *Summa Theologica* Question 40 First Article. Aquinas answers that it is not always sinful to wage war. *Codex Juris Canonici*, Canon 1366 par. 2 admonishes instructors of the Catholic religion to "follow the Angelic Doctor's [Aquinas'] method, doctrine and principles and steadfastly adhere to them."

Under the majority opinion Negre is subjected to disability solely because he will not renounce, disavow and declare to be false the teaching of St. Thomas Aquinas and the other Fathers, Doctors, Saints and Popes who have pronounced the authoritative religious doctrine of the Catholic Church.

The majority opinion asserts that the punishment or disability for religious doctrine involved in its construction of section 6(j) does not intrude upon "‘voluntarism’ in religious life . . ." Slip opinion p. 16.

"A claimant, seeking judicial protection for his own conscientious beliefs, would be hard put to argue that § 6(j) encourages membership in putatively ‘favored’ religious organizations, for the painful dilemma of the sincere conscientious objector arises precisely because he feels himself bound in conscience not to compromise his beliefs or affiliations."

We concede immediately that the devout Catholic is not supposed to surrender his faith though the state threatens him with punishment for holding fast to it. Particularly instructive is the case of Thomas More, former Lord Chancellor of England. In a letter to his daughter describing his interrogation in the Tower, More tells how the Archbishop of Canterbury, cooperating with the government, put it to More:

"you know for a certainty and a thing without doubt that you be bounden to obey your sovereign lord your king. And therefore are ye bounden to leave of the doubt of your unsure conscience in refusing the oath, and take the sure way in obeying of your prince, and swear it."

To this More answered

"that in my conscience this was one of the cases in which I was bounden that I should not obey my prince since that whatsoever other folk thought in the matter

(whose conscience or learning I would not condemn nor take upon me to judge) yet in my conscience the truth seemed on the other side." (More to his daughter, Margaret, April 1534, *The Last Letters of Blessed Thomas More* ed. W.C. Campbell, 1924, pp. 40-41).

Beheaded by the state for his fidelity to conscience, Thomas More has been recognized as a martyr for the Catholic faith and canonized as a saint of the Catholic Church (*Acta apostolicae sedis* XXVII, pp. 202-204).

In the context of refusal of military service obedient to Catholic religious conscience we find the Austrian peasant, Franz Jagerstatter, who was beheaded on August 9, 1943 for refusing to serve in the German army on the ground that he would be participating in an unjust war. In prison Jagerstatter wrote:

"There are probably many Catholics who think they would be suffering and dying for the faith only if they had to suffer punishment for refusing to renounce the Catholic Church. But I believe that everyone who is ready to suffer and die rather than offend God by even the slightest venial sin also suffers for his faith.—I definitely prefer to relinquish my rights under the Third Reich and thus make sure of deserving the rights granted under the Kingdom of God." (Jagerstatter, Statement, quoted in Gordon C. Zahn, *In Solitary Witness: The Life and Death of Franz Jagerstatter* pp. 128-129).

Suffering death because of his conscientious selective objection to Hitler's war, Jagerstatter acted in obedience to his religious convictions as a Catholic.

We thus concede that devout Catholics will not surrender their religious faith because the government of the United States of America under section 6(j) of the Military Selective Service Act subjects them to disability or punishment for holding to their religious doctrine.

What we do not concede is the very odd view of "establishment of religion, or prohibiting the free exercise thereof" espoused by the court at page 16 of the slip opinion that section 6(j) is not an establishment of "putatively 'favored' religious organizations" nor an interference with freedom of religious belief because true Catholic believers ought to and will accept death, literally, rather than surrender their faith in God and his Church.

Have we come so far down the road of judicial relativism that it is not establishment of religion nor interference with the free exercise thereof for Congress to pass a law which exacts punishment of a man who will not disavow his religion? If so the First Amendment has become meaningless, and the Supreme Court has forgotten the great words of Chief Justice Marshall:

"That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected.

•   •   •   •   •   •   •

"The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if those limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it. *Marbury v. Madison*, 1 Cranch 176-177, 2 L.Ed. 60 at 73 (1803).

In stark contrast to the courageous trust of the early court in the constitution, in the present case the majority opinion



disregards the limitations placed by the First Amendment on Congress under the false premise that:

"The conscription laws, applied to [objectors to particular wars] do not work a penalty on any theological position." Slip opinion p. 25.

The premise is false because the conscription laws as interpreted in the present case work a penalty upon the theological position of Negre and any other religious person who by reason of conscience is unable to participate in the present war, but whose religion teaches that in other hypothetical future circumstances it would not be sinful for the member of the religion to participate in another, different, hypothetical war.

As if recognizing that the premise is false, the opinion continues that the burdens upon religious objectors to the particular war in which they are called to serve are justified by

"substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies. Art. I, § 8."

But Congress never passes laws which do not reflect in its view "substantial governmental interests", and the First Amendment like the other amendments in the Bill of Rights was passed expressly to limit the powers conferred on Congress and the government by the prior portions of the constitution including Article I section 8.

**CONCLUSION**

The majority opinion is inconsistent with the facts in the record. The majority concludes that the conscription laws "do not work a penalty against any theological position." The facts of record to the contrary prove that the conscription laws work a penalty against Negro solely because of his theological position.

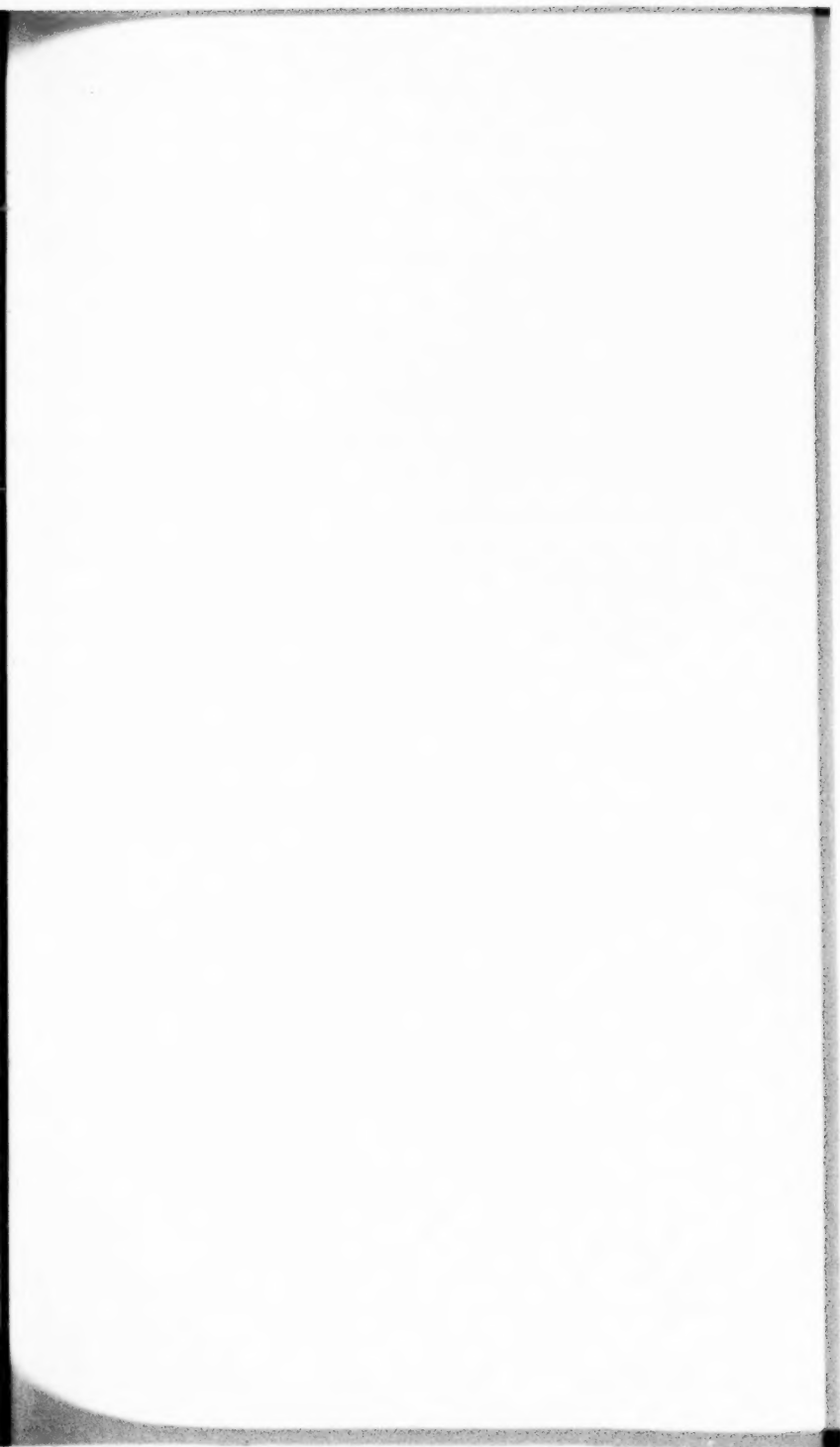
For the reasons stated the court should grant rehearing and reverse the judgment below against Negro.

Dated: March 31, 1971.

Respectfully submitted,

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

### GILLETTE *v.* UNITED STATES

#### CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85. Argued December 9, 1970—Decided March 8, 1971\*

Petitioner in No. 85, who was convicted for failure to report for induction, and petitioner in No. 325, who sought discharge from the armed forces upon receipt of orders for Vietnam duty, claim exemption from military service because of their conscientious objections to participation in the Vietnam conflict, as an “unjust” war, pursuant to § 6 (j) of the Military Selective Service Act of 1967. That section provides that no person shall be subject to “service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.” Petitioners also challenge the constitutionality of § 6 (j) as construed to cover only objectors to all war, as violative of the Free Exercise and Establishment of Religion Clauses of the First Amendment. *Held*:

1. The exemption for those who oppose “participation in war in any form” applies to those who oppose participating in all war and not to those who object to participation in a particular war only, even if the latter objection is religious in character. Pp. 3-11.

2. Section 6 (j) does not violate the Establishment Clause of the First Amendment. Pp. 11-23.

(a) The section on its face does not discriminate on the basis of religious affiliation or belief, and petitioners have not shown the absence of neutral, secular bases for the exemption. Pp. 13-15.

(b) The exemption provision focuses on individual conscientious belief and not on sectarian affiliations. P. 16.

(c) There are valid neutral reasons, with the central emphasis on the maintenance of fairness in the administration of

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\*Together with No. 325, *Negre v. Larsen et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

## Syllabus

military conscription, for the congressional limitation of the exemption to "war in any form," and therefore § 6 (j) cannot be said to reflect a religious preference. Pp. 17-23.

3. Section 6 (j) does not violate the Free Exercise Clause. It is not designed to interfere with any religious practice and does not penalize any theological position. Any incidental burdens felt by petitioners are justified by the substantial governmental interests relating to military conscription. Pp. 23-25.

No. 85, 420 F. 2d 298, and No. 325, 418 F. 2d 908, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, BRENNAN, STEWART, WHITE, and BLACKMUN, JJ., joined. BLACK, J., concurred in the judgment and in Part I of the Court's opinion. DOUGLAS, J., filed dissenting opinions.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

Nos. 85 & 325.—OCTOBER TERM, 1970

85	Guy Porter Gillette, Petitioner, v. United States.	}	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

325	Louis A. Negre, Petitioner, v. Stanley R. Larsen et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March 8, 1971]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

These cases present the question whether conscientious objection to a particular war, rather than objection to war as such, relieves the objector from responsibilities of military training and service. Specifically, we are called upon to decide whether conscientious scruples relating to a particular conflict are within the purview of established provisions<sup>1</sup> relieving conscientious objectors to war from military service. Both petitioners also invoke constitutional principles barring government interference with the exercise of religion and requiring governmental neutrality in matters of religion.

In No. 85, petitioner Gillette was convicted of wilful failure to report for induction into the armed forces. Gillette defended on the ground that he should have been ruled exempt from induction as a conscientious objector to war. In support of his unsuccessful request for classi-

<sup>1</sup> The relevant provisions are set down *infra*, at nn. 4, 5, and 6, and at accompanying text.

fication as a conscientious objector, this petitioner had stated his willingness to participate in a war of national defense or a war sponsored by the United Nations as a peace-keeping measure, but declared his opposition to American military operations in Vietnam, which he characterized as "unjust." Petitioner concluded that he could not in conscience enter and serve in the armed forces during the period of the Vietnam conflict. Gillette's view of his duty to abstain from any involvement in a war seen as unjust is, in his words, "based on a humanist approach to religion," and his personal decision concerning military service was guided by fundamental principles of conscience and deeply held views about the purpose and obligation of human existence.

The District Court determined that there was a basis in fact to support administrative denial of exemption in Gillette's case. The denial of exemption was upheld, and Gillette's defense to the criminal charge rejected, not because of doubt about the sincerity or the religious character of petitioner's objection to military service, but because his objection ran to a particular war. In affirming the conviction, the Court of Appeals concluded that Gillette's conscientious beliefs "were specifically directed against the war in Vietnam," while the relevant exemption provision of the Military Selective Service Act of 1967, 50 U. S. C. App. § 456 (j), "requires opposition 'to participation in war in any form.'" 420 F. 2d 298, 299-300 (CA2 1970).

In No. 325, petitioner Negre, after induction into the Army, completion of basic training, and receipt of orders for Vietnam duty, commenced proceedings looking to his discharge as a conscientious objector to war. Application for discharge was denied, and Negre sought judicial relief by habeas corpus. The District Court found a basis in fact for the Army's rejection of petitioner's application for discharge. Habeas relief was denied, and the

denial was affirmed on appeal, because, in the language of the Court of Appeals, Negre "objects to the war in Vietnam, not to all wars," and therefore does "not qualify, for separation [from the Army], as a conscientious objector."<sup>2</sup> 418 F. 2d 908, 909-910 (CA9 1969). Again, no question is raised as to the sincerity or the religious quality of this petitioner's views. In line with religious counseling and numerous religious texts, Negre, a devout Catholic, believes that it is his duty as a faithful Catholic to discriminate between "just" and "unjust" wars, and to foreswear participation in the latter. His assessment of the Vietnam conflict as an unjust war became clear in his mind after completion of infantry training, and Negre is now firmly of the view that any personal involvement in that war would contravene his conscience and "all that I had been taught in my religious training."

We granted certiorari in these cases, 399 U. S. 925 (1970), in order to resolve vital issues concerning the exercise of congressional power to raise and support armies, as affected by the religious guaranties of the First Amendment. We affirm the judgments below in both cases.

## I

Each petitioner claims a nonconstitutional right to be relieved of the duty of military service in virtue of his conscientious scruples.<sup>3</sup> Both claims turn on the proper

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<sup>2</sup> Since petitioner Negre is no longer on active duty in the Army, the dispute in No. 325 lacks the same intensity that was present at the time that Negre commenced his habeas action. However, some possibility of Vietnam duty apparently remains, and the Government seems to concede that the case has not been mooted. We therefore pursue the matter no further.

<sup>3</sup> Both petitioners asked to be spared all military responsibilities because of their objections to the Vietnam conflict—Gillette sought exemption from the draft; Negre sought discharge from the Army.



construction of § 6 (j) of the Military Selective Service Act of 1967, 50 U. S. C. App. § 456 (j), which provides:

"Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.<sup>4</sup>

This language controls Gillette's claim to exemption, which was asserted administratively prior to the point of induction. Department of Defense Directive No. 1300.6 (May 10, 1968), prescribes that post-induction claims to conscientious objector status shall be honored, if valid, by the various branches of the armed forces.<sup>5</sup> Section 6 (j) of the Act, as construed by the courts, is

<sup>4</sup> Section 6 (j) provides further:

"As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces . . . , be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered . . . to perform . . . civilian work contributing to the maintenance of the national health, safety, or interest . . . ."

<sup>5</sup> The Directive states:

"IV. A. *National Policy*. . . . [T]he Congress . . . has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces and accordingly has provided that a person having bona fide religious objection to participation in war in any form . . . shall not be inducted into the Armed Forces . . . .

"IV. B. *DoD Policy*. Consistent with this national policy, bona fide conscientious objection . . . by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable. Objection to a particular war will not be recognized."

incorporated by the various service regulations issued pursuant to the Directive,<sup>6</sup> and thus the standards for measuring claims of in-service objectors, such as Negre, are the same as the statutory tests applicable in a pre-induction situation.

For purposes of determining the statutory status of conscientious objection to a particular war, the focal language of § 6 (j) is the phrase, "conscientiously opposed to participation in war in any form." This language, on a straightforward reading, can bear but one meaning; that conscientious scruples relating to war and military service must amount to conscientious opposition to participating personally in any war and all war. See *Welsh v. United States*, 398 U. S. 333, 340, 342 (1970); *id.*, at 347, 357 (concurring opinion). See also *United States v. Kauten*, 133 F. 2d 703, 707 (CA2 1943). It matters little for present purposes whether the words, "in any form," are read to modify "war" or "participation." On the first reading, conscientious scruples must implicate "war in any form," and an objection involving a particular war rather than all war would plainly not be covered by § 6 (j). On the other reading, an objector must oppose "participation in war." It would strain good sense to read this phrase otherwise than to mean, "participation in all war." For the word "war" would still be used in an unqualified, generic sense, meaning war as such. Thus,

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<sup>6</sup> DOD Directive No. 1300.6 itself states:

"Since it is in the national interest to judge all claims of conscientious objection by the same standards, whether made before or after entering military service, Selective Service System standards used in determining [conscientious objector status] of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering military service."

See also, *e. g.*, Army Regulations AR 635-20 (July 31, 1970), and AR 135-25 (September 2, 1970).

however the statutory clause be parsed, it remains that conscientious objection must run to war in any form.<sup>7</sup>

A different result cannot be supported by reliance on the materials of legislative history.<sup>8</sup> Petitioners and

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<sup>7</sup> Moreover, a reading that attaches the words "in any form" to "participation," rather than to "war," would render § 6 (j) somewhat incoherent. For that section itself allows a person having the specified conscientious scruples to be assigned to noncombatant service in the armed forces, if he is not "found to be conscientiously opposed to participation in such noncombatant service." See n. 4, *supra*. In short, Congress had in mind that conscientious scruples should be honored if they implicate opposition to "war in any form," even though the objector may not be averse to a noncombatant form of "participation."

<sup>8</sup> The roots of § 6 (j) may be found in the earliest period of American history. See generally Selective Service System Monograph No. 11, Conscientious Objection 29-38 (1950). In 1775 the Continental Congress announced its resolve to respect the beliefs of "people who from Religious Principles cannot bear Arms in any case . . . ." *Id.*, at 33-34. Against a background of state constitutional and statutory law exempting conscientious objectors from militia service, see *United States v. Seeger*, 380 U. S. 163, 170-171 (1965), Congress in 1864 explicitly exempted from the federal draft persons who "are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the articles of faith [of their] religious denominations." 13 Stat. 6, 9. The Draft Act of 1917 relieved from military service any person who belonged to "any well-recognized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein . . . ." 40 Stat. 76, 78. The Senate rejected an amendment to the 1917 legislation which would have granted exemptions "[o]n the ground of a conscientious objection to the undertaking of combatant service in the present war." 55 Cong. Rec. 1474, 1478. Subsequent exemption clauses have eliminated any restriction in terms of sectarian affiliation, and have made the exemption broadly available to any conscientious objector whose scruples concerning participation in war are grounded in "religious training and belief." Selective Training and Service Act of 1940, 54 Stat. 885, 889. But the phrase "participation in war in any form," used in the 1917 enactment, has of course survived the various revisions of the exempting provision.

*amici* point to no episode or pronouncement in the legislative history of § 6 (j), or of predecessor provisions, that tends to overthrow the obvious interpretation of the words themselves.<sup>9</sup>

It is true that the legislative materials reveal a deep concern for the situation of conscientious objectors to war, who absent special status would be put to a hard choice between contravening imperatives of religion and conscience or suffering penalties. Moreover, there are clear indications that congressional reluctance to impose such a choice stems from a recognition of the value of conscientious action to the democratic community at large, and from respect for the general proposition that fundamental principles of conscience and religious duty may sometimes override the demands of the secular state.

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<sup>9</sup> Petitioners' sole argument having specific reference to the legislative materials is utterly flawed. It runs as follows: the 1948 revision of the exempting provision was inspired in part by the dissent of Chief Justice Hughes in *United States v. MacIntosh*, 283 U. S. 589 (1931); *MacIntosh* involved a claimant whose conscientious scruples implicated only "unjust" wars, and the dissent remarked that "eminent statesmen here and abroad" have held such views, *id.*, at 635; thus Congress cannot fairly be deemed to have excluded objectors to particular wars from the 1948 exempting provision, predecessor to the present § 6 (j). However, the very most that can be said about congressional reliance on the *MacIntosh* dissent is that Congress used it in fashioning a definition of the words "religious training and belief." See *United States v. Seeger*, 380 U. S. 163, 172-179 (1965). The language of the exempting provision that is relevant to the present dispute—"participation in war in any form"—was not altered in 1948 or thereafter. Moreover, the *MacIntosh* dissent does not itself suggest that conscientious objection to a particular war is or has ever been a basis for relief from military service. The claimant in *MacIntosh* did not seek relief from military service—his contention, and that of the dissent, was that conscientious unwillingness to bear arms is not a disqualifying factor, under the language of the applicable loyalty oath, in a naturalization proceeding. (The argument of the dissent was later adopted by the Court in *Girouard v. United States*, 383 U. S. 61, 64 (1946).)

See *United States v. Seeger*, 380 U. S. 163, 170-172 (1965); *United States v. MacIntosh*, 283 U. S. 605, 631-634 (1931) (dissenting opinion). See generally Selective Service System Monograph No. 11, *Conscientious Objection* (1950). But there are countervailing considerations, which are also the concern of Congress,<sup>10</sup> and the legislative materials simply do not support the view that Congress intended to recognize any conscientious claim whatever as a basis for relieving the claimant from the general responsibility or the various incidents of military service. The claim that is recognized by § 6 (j) is a claim of conscience running against war as such. This claim, not one involving opposition to a particular war only, was plainly the focus of congressional concern.

Finding little comfort in the wording or the legislative history of § 6 (j), petitioners rely heavily on dicta in the decisional law dealing with objectors whose conscientious scruples ran against war as such, but who indicated certain reservations of an abstract nature. It is instructive that none of the cases relied upon embraces an interpretation of § 6 (j) at variance with the construction we adopt today.<sup>11</sup>

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<sup>10</sup> See pp. 17-23, *infra*. See generally Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* 50-51 (1967).

<sup>11</sup> Perhaps more significant is the fact that even lower courts that have granted relief to claimants who object to particular wars, have done so on constitutional, not statutory grounds, and have found § 6 (j) defective because it does not admit of such relief. See, e. g., *United States v. McFadden*, 309 F. Supp. 502 (ND Calif. 1970), appeal pending on jurisdictional statement (No. 422, O. T. 1970); *United States v. Sisson*, 297 F. Supp. 902 (Mass. 1969), appeal dismissed for want of jurisdiction, 399 U. S. 267 (1970). Since we conclude that § 6 (j), interpreted in the obvious way, suffers no constitutional infirmity, there is no temptation to expand its intended scope by constructional fiat in order to "save" it.

*Sicurella v. United States*, 348 U. S. 385 (1955), presented the only previous occasion for this Court to focus on the "participation in war in any form" language of § 6 (j). In *Sicurella* a Jehovah's Witness who opposed participation in secular wars was held to possess the requisite conscientious scruples concerning war, although he was not opposed to participation in a "theocratic war" commanded by Jehovah. The Court noted that the "theocratic war" reservation was highly abstract—no such war had occurred since biblical times, and none was contemplated. Congress, on the other hand, had in mind "real shooting wars," *id.*, at 391, and *Sicurella's* abstract reservations did not undercut his conscientious opposition to participating in such wars. Plainly *Sicurella* cannot be read to support the claims of those, like petitioners, who for a variety of reasons consider one particular "real shooting war" to be unjust, and therefore oppose participation in that war.<sup>12</sup>

It should be emphasized that our cases explicating the "religious training and belief" clause of § 6 (j), or cognate clauses of predecessor provisions, are not relevant to the present issue. The question here is not whether these petitioners' beliefs concerning war are "religious" in nature. Thus petitioners' reliance on *United States v. Seeger*, 380 U. S. 163 (1965), and *Welsh v. United States*, 398 U. S. 333 (1970), is misplaced. Nor do we decide

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<sup>12</sup> After noting that *Sicurella's* faith involved willingness to engage in theocratic conflict, though "without carnal weapons," the Court stated: "The test is not whether the registrant is opposed to all war, but whether he is opposed . . . to participation in war." 348 U. S., at 390. The plain purport of this statement is that opposition to theocratic war is not exacted, since Congress quite reasonably considered participation in "real shooting wars" to be the only sort of participation at stake. See also *Taffs v. United States*, 208 F. 2d 329, 331 (CA8 1953), cert. denied, 347 U. S. 928 (1954).

that conscientious objection to a particular war necessarily falls within § 6 (j)'s expressly excluded class<sup>13</sup> of "essentially political, sociological, or philosophical views, or a merely personal moral code." Rather we hold that Congress intended to exempt persons who oppose participating in all war—"participation in war in any form"—and that persons who object solely to participation in a particular war are not within the purview of the exempting section, even though the latter objection may have such roots in a claimant's conscience and personality that it is "religious" in character.

A further word may be said to clarify our statutory holding. Apart from abstract theological reservations, two other sorts of reservations concerning use of force have been thought by lower courts not to defeat a conscientious objector claim. Willingness to use force in self-defense, in defense of home and family, or in defense against immediate acts of aggressive violence toward other persons in the community, has not been regarded as inconsistent with a claim of conscientious objection to war as such. See, *e. g.*, *United States v. Haughton*, 413 F. 2d 736, 740-742 (CA9 1969); *United States v. Carroll*, 398 F. 2d 651, 655 (CA3 1968). But surely willingness to use force defensively in the personal situations mentioned is quite different from willingness to fight in some wars but not in others. Cf. *Sicurella v. United States*, 348 U. S., at 389. Somewhat more apposite to the instant situation are cases dealing with persons who oppose participating in all wars, but cannot say with complete certainty that their present convictions and existing state of mind are unalterable. See, *e. g.*, *United States v. Owen*, 415 F. 2d 383, 390 (CA8 1969). Unwillingness to deny the possibility of a change of mind, in some hypothetical future circumstances, may be no more than humble good sense, casting no doubt on the

<sup>13</sup> See n. 4, *supra*.



claimant's present sincerity of belief. At any rate there is an obvious difference between present sincere objection to all war, and present opposition to participation in a particular conflict only.

## II

Both petitioners argue that § 6 (j), construed to cover only objectors to all war, violates the religious clauses of the First Amendment. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Petitioners contend that Congress interferes with free exercise of religion by failing to relieve objectors to a particular war from military service, when the objection is religious or conscientious in nature. While the two religious clauses—pertaining to "free exercise" and "establishment" of religion—overlap and interact in many ways, see *Abington School District v. Schempp*, 374 U. S. 203, 222-223 (1963); Freund, *Public Aid To Parochial Schools*, 82 Harv. L. Rev. 1680, 1684 (1969), it is best to focus first on petitioners' other contention, that § 6 (j) is a law respecting the establishment of religion. For despite free exercise overtones, the gist of the constitutional complaint is that § 6 (j) impermissibly discriminates among types of religious belief and affiliation.<sup>14</sup>

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<sup>14</sup> Petitioners also assert that the Fifth Amendment's Due Process Clause is violated, because the distinction embodied in § 6 (j)—between objectors to all war and objectors to particular wars—is arbitrary and capricious and works an invidious discrimination in contravention of the "equal protection" principles encompassed by the Fifth Amendment. Cf. *Bolling v. Sharpe*, 347 U. S. 497, 499 (1954). This is not an independent argument in the context of these cases. Cf. *Walz v. Tax Commission*, 397 U. S. 664, 696 (1970) (opinion of HARLAN, J.). We hold that the section survives the Establishment Clause because there are neutral, secular reasons to justify the line that Congress has drawn, and it follows as a more general matter that the line is neither arbitrary nor invidious.



On the assumption that these petitioners' beliefs concerning war have roots that are "religious" in nature, within the meaning of the Amendment as well as this Court's decisions construing § 6 (j), petitioners ask how their claims to relief from military service can be permitted to fail, while other "religious" claims are upheld by the Act. It is a fact that § 6 (j), properly construed, has this effect. Yet we cannot conclude in mechanical fashion, or at all, that the section works an establishment of religion.

An attack founded on disparate treatment of "religious" claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring governmental neutrality in matters of religion. See *Epperson v. Arkansas*, 393 U. S. 97, 103–104 (1968); *Everson v. Board of Education*, 330 U. S. 1, 15–16 (1947). Here there is no claim that exempting conscientious objectors to war amounts to an overreaching of secular purposes and an undue involvement of government in affairs of religion. Cf. *Walz v. Tax Commission*, 397 U. S. 664, 675 (1970); *id.*, at 695 (opinion of HARLAN, J.). To the contrary, petitioners ask for greater "entanglement" by judicial expansion of the exemption to cover objectors to particular wars. Necessarily the constitutional value at issue is "neutrality." And as a general matter it is surely true that the Establishment Clause prohibits government from departing secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization. See *Engel v. Vitale*, 370 U. S. 421, 430–431 (1962); *Torcaso v. Watkins*, 367 U. S. 488, 495 (1961). The metaphor of a "wall" or impassible barrier between Church and State, taken too literally, may mislead constitutional analysis, see *Walz v. Tax Commission*, 397 U. S. 664, 668–669 (1970); *Zorach v. Clauson*, 343 U. S. 306, 312–313 (1952), but the Establishment Clause

stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact. *Abington School District v. Schempp*, 374 U. S. 203, 222 (1963); *id.*, at 231 (BRENNAN, J., concurring); *id.*, at 305 (Goldberg, J., concurring).

## A

The critical weakness of petitioners' establishment claim arises from the fact that § 6 (j), on its face, simply does not discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning war. The section says that anyone who is conscientiously opposed to all war shall be relieved of military service. The specified objection must have a grounding in "religious training and belief," but no particular sectarian affiliation or theological position is required. The Draft Act of 1917, 40 Stat. 76, 78, extended relief only to those conscientious objectors affiliated with some "well-recognized religious sect or organization" whose principles forbade members' participation in war, but the attempt to focus on particular sects apparently broke down in administrative practice, *Welsh v. United States*, 398 U. S. 333, 367 n. 19 (1970) (concurring opinion), and the 1940 Selective Training and Service Act, 54 Stat. 885, 889, discarded all sectarian restriction.<sup>15</sup> Thereafter Congress has framed the conscientious objector exemption in broad terms compatible with "its long-established policy of not picking and choosing among religious beliefs." *United States v. Seeger*, 380 U. S. 163, 175 (1965).

Thus there is no occasion to consider the claim that when Congress grants a benefit expressly to adherents of one *religion*, courts must either nullify the grant or

<sup>15</sup> See n. 8, *supra*.

somehow extend the benefit to cover all religions. For § 6 (j) does not single out any religious organization or religious creed for special treatment. Rather petitioners' contention is that since Congress has recognized one sort of conscientious objection concerning war, whatever its religious basis, the Establishment Clause commands that another, different objection be carved out and protected by the courts.<sup>16</sup>

Properly phrased, petitioners' contention is that the special statutory status accorded conscientious objection to all war, but not objection to a particular war, works a de facto discrimination among religions. This happens, say petitioners, because some religious faiths themselves distinguish between personal participation in "just" and in "unjust" wars, commending the former and forbidding the latter, and therefore adherents of some religious faiths—and individuals whose personal beliefs of a religious nature include the distinction—cannot object to all wars consistently with what is regarded as the true imperative of conscience. Of course this contention of de facto religious discrimination, rendering § 6 (j) fatally underinclusive, cannot simply be brushed aside. The question of governmental neutrality is not concluded by the observation that § 6 (j) on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, "religious gerrymanders," as well as obvious abuses. *Walz v. Tax Commission*, 397 U. S. 664, 696 (1970) (opinion of HARLAN, J.). See also *Braunfeld v. Brown*, 366 U. S. 599, 607 (1961) (opinion of Warren, C. J.); *Illinois ex*

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<sup>16</sup> Since we hold that the "participation in war in any form" clause of § 6 (j) does not violate the First Amendment, there is little point in dealing with the problems that would be involved in deciding whether invalidity of the restrictive clause should lead to judicial nullification of the exemption *in toto* or judicial expansion to cure "underinclusiveness."

rel *McCollum v. Board of Education*, 333 U. S. 203, 213, 232 (1948) (opinion of Frankfurter, J.). Still a claimant alleging "gerrymander" must be able to show the absence of a neutral, secular basis for the lines government has drawn. See *Epperson v. Arkansas*, 393 U. S. 97, 107-109 (1968); *Board of Education v. Allen*, 392 U. S. 236, 248 (1968); *McGowan v. Maryland*, 366 U. S. 420, 442-444 (1961); *id.*, at 468 (separate opinion of Frankfurter, J.). For the reasons that follow, we believe that petitioners have failed to make the requisite showing with respect to § 6 (j).

Section 6 (j) serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions.<sup>17</sup> There are considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man, *Welch v. United States*, 398 U. S. 333, 369 (1970) (WHITE, J., dissenting), but no doubt the section reflects as well the view that "in the forum of conscience, duty to a moral power higher than the State has always been maintained." *United States v. MacIntosh*, 283 U. S. 605, 633 (1931) (Hughes, C. J., dissenting). See *United States v. Seeger*, 380 U. S. 163, 170-172 (1965). We have noted that the legislative materials show congressional concern for the hard choice that conscription would impose on conscientious objectors to war, as well as respect for the value of conscientious action and for the principle of supremacy of conscience.<sup>18</sup>

<sup>17</sup> The exemption provision of the Draft Act of 1917, 40 Stat. 76, 78, was upheld in *The Selective Draft Law Cases*, 245 U. S. 366, 389-390 (1918), at an early stage in the development of First Amendment doctrine, against a constitutional attack apparently founded on both the Establishment and Free Exercise Clauses. A single sentence was devoted to the complainants' First Amendment argument, "because we think its unsoundness is too apparent to require us to do more." *Id.*, at 390.

<sup>18</sup> See pp. 7-8, *supra*.

Naturally the considerations just mentioned are affirmative in character, going to support the existence of an exemption rather than its restriction specifically to persons who object to all war. The point is that these affirmative purposes are neutral in the sense of the Establishment Clause. Quite apart from the question whether the Free Exercise Clause might require some sort of exemption,<sup>19</sup> it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience." *United States v. MacIntosh*, 283 U. S. 605, 634 (1931) (Hughes, C. J., dissenting). See *Abington School District v. Schempp*, 374 U. S. 203, 294-299 (1963) (BRENNAN, J., concurring); *id.*, at 306 (Goldberg, J., concurring); *id.*, at 309 (STEWART, J., dissenting). See also *Welsh v. United States*, 398 U. S. 333, 370-373 (1970) (WHITE, J., dissenting). "Neutrality" in matters of religion is not inconsistent with "benevolence" by way of exemptions from onerous duties, *Walz v. Tax Commission*, 397 U. S. 664, 669 (1970), so long as an exemption is tailored broadly enough that it reflects valid secular purposes. In the draft area for 30 years the exempting provision has focused on individual conscientious belief, not on sectarian affiliation. The relevant individual belief is simply objection to all war, not adherence to any extraneous theological viewpoint. And while the objection must have roots in conscience and personality that are "religious" in nature, this requirement has never been construed to elevate conventional piety or religiosity of any kind above the imperatives of a personal faith.

In this state of affairs it is impossible to say that § 6 (j) intrudes upon "voluntarism" in religious life, see *id.*, at

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<sup>19</sup> See n. 23, *infra*.

694-696 (opinion of HARLAN, J.), or that the congressional purpose in enacting § 6 (j) is to promote or foster those religious organizations that traditionally have taught the duty to abstain from participation in any war. A claimant, seeking judicial protection for his own conscientious beliefs, would be hard put to argue that § 6 (j) encourages membership in putatively "favored" religious organizations, for the painful dilemma of the sincere conscientious objector arises precisely because he feels himself bound in conscience not to compromise his beliefs or affiliations.

### B

We conclude not only that the affirmative purposes underlying § 6 (j) are neutral and secular, but also that valid neutral reasons exist for limiting the exemption to objectors to all war, and that the section therefore cannot be said to reflect a religious preference.

Apart from the Government's need for manpower, perhaps the central interest involved in the administration of conscription laws is the interest in maintaining a fair system for determining "who serves when not all serve."<sup>20</sup> When the Government exacts so much, the importance of fair, evenhanded, and uniform decisionmaking is obviously intensified. The Government argues that the interest in fairness would be jeopardized by expansion of § 6 (j) to include conscientious objection to a particular war. The contention is that the claim to relief on account of such objection is intrinsically a claim of uncertain dimensions, and that granting the claim in theory would involve a real danger of erratic or even discriminatory decisionmaking in administrative practice.

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<sup>20</sup> The Report of the National Advisory Commission on Selective Service (1967) is aptly entitled, *In Pursuit of Equity: Who Serves When Not All Serve?*

A virtually limitless variety of beliefs are subsumable under the rubric, "objection to a particular war."<sup>21</sup> All the factors that might go into nonconscientious dissent from policy, also might appear as the concrete basis of an objection that has roots as well in conscience and religion. Indeed, over the realm of possible situations, opposition to a particular war may more likely be political and nonconscientious, than otherwise. See *United States v. Kauten*, 133 F. 2d 703, 708 (CA2 1943). The difficulties of sorting the two, with a sure hand, are considerable. Moreover, the belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events. Since objection may fasten on any of an enormous number of variables, the claim is ultimately subjective, depending on the claimant's view of the facts in relation to his judgment that a given factor or congeries of factors colors the character of the war as a whole. In short, it is not at all obvious in theory what sorts of objections should be deemed sufficient to excuse an objector, and there is considerable force in the Government's contention that a program of excusing objectors to particular wars may be "impossible to conduct with any hope of reaching fair and consistent results . . . ." Brief, at 28.

For their part, petitioners make no attempt to provide a careful definition of the claim to exemption which they

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<sup>21</sup> Matters relevant to such an objection, as the papers in these cases show, are whether the purposes of the war are thought ultimately defensive and pacific, or otherwise; whether the conflict is legal, or its prosecution decided upon by legal means; whether the implements of war are used humanely, or whether certain weapons should be used at all. A war may be thought "just" or not depending on one's assessment of these factors and many more: the character of the foe, or of allies; the place the war is fought; the likelihood that a military clash will issue in benefits, of various kinds, enough to override the inevitable costs of the conflict. And so on.

ask the courts to carve out and protect. They do not explain why objection to a particular conflict—much less an objection that focuses on a particular facet of a conflict—should excuse the objector from all military service whatever, even from military operations that are connected with the conflict at hand in remote or tenuous ways.<sup>22</sup> They suggest no solution to the problems arising from the fact that altered circumstances may quickly render the objection to military service moot.

To view the problem of fairness and evenhanded decisionmaking, in the present context, as merely a commonplace chore of weeding out "spurious claims," is to minimize substantial difficulties of real concern to a responsible legislative body. For example, under the petitioners' unarticulated scheme for exemption, an objector's claim to exemption might be based on some feature of a current conflict which most would regard as incidental, or might be predicated on a view of the facts which most would regard as mistaken. The particular complaint about the war may itself be "sincere," but it is difficult to know how to judge the "sincerity" of the objector's conclusion that the war *in toto* is unjust and that any personal involvement would contravene conscience and religion. To be sure we have ruled, in connection with § 6 (j), that "the 'truth' of a belief is not open to question"; rather, the question is whether the objector's beliefs are "truly held." *United States v. Seeger*, 380 U. S. 163, 185 (1965). See also *United States v. Ballard*, 322 U. S. 78 (1944). But we must also recognize that "sincerity" is a concept that can bear only so much adjudicative weight.

Ours is a Nation of enormous heterogeneity in respect of political views, moral codes, and religious persuasions. It does not bespeak an establishing of religion for Con-

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<sup>22</sup> See n. 3, *supra*.



gress to forgo the enterprise of distinguishing those whose dissent has some conscientious basis from those who simply dissent. There is a danger that as between two would-be objectors, both having the same complaint against a war, that objector would succeed who is more articulate, better educated, or better counseled. There is even a danger of unintended religious discrimination—a danger that a claim's chances of success would be greater the more familiar or salient the claim's connection with conventional religiosity could be made to appear. At any rate, it is true that "the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement" in determining the character of persons' beliefs and affiliations, thus "entangl[ing] government in difficult classifications of what is or is not religious," or what is or is not conscientious. *Walz v. Tax Commission*, 397 U. S. 664, 698–699 (1970) (opinion of HARLAN, J.). Cf. *Presbyterian Church v. Mary Elizabeth Blue Hull Church*, 393 U. S. 440 (1969). While the danger of erratic decisionmaking unfortunately exists in any system of conscription that takes individual differences into account, no doubt the dangers would be enhanced if a conscientious objection of indeterminate scope were honored in theory.

In addition to the interest in fairness, the Government contends that neutral, secular reasons for the line drawn by § 6 (j)—between objection to all war and objection to a particular war—may be found in the nature of the conscientious claim which these petitioners assert. Opposition to a particular war, states the Government's Brief, necessarily involves a judgment "that is political and particular," one "based on the same political, sociological and economic factors that the government necessarily considered" in deciding to engage in a particular conflict. Brief, at 24–26. Taken in a narrow sense,

these considerations do not justify the distinction at issue, for however "political and particular" the judgment underlying objection to a particular war, the objection still might be rooted in religion and conscience, and although the factors underlying that objection were considered and rejected in the process of democratic decision-making, likewise the viewpoint of an objector to all war was no doubt considered and "necessarily" rejected as well. Nonetheless it can be seen on a closer view that this line of analysis, conjoined with concern for fairness, does support the statutory distinction.

Tacit at least in the Government's view of the instant cases is the contention that the limits of § 6 (j) serve an overriding interest in protecting the integrity of democratic decisionmaking against claims to individual non-compliance. Despite emphasis on claims that have a "political and particular" component, the logic of the contention is sweeping. Thus the "interest" invoked is highly problematical, for it would seem to justify governmental refusal to accord any breathing space whatever to noncompliant conduct inspired by imperatives of religion and conscience.

On the other hand, some have perceived a danger that exempting persons who dissent from a particular war, albeit on grounds of conscience and religion in part, would "open the doors to a general theory of selective disobedience to law" and jeopardize the binding quality of democratic decisions. Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?*, at 50 (1967). See also *Hamilton v. Regents*, 293 U. S. 245, 268 (1934) (Cardozo, J., concurring). Other fields of legal obligation aside, it is undoubted that the nature of conscription, much less war itself, requires the personal desires and perhaps the dissenting views of those who must serve to be subordinated in some degree to the pursuit

of public purposes. It is also true that opposition to a particular war does depend *inter alia* upon particularistic factual beliefs and policy assessments, beliefs and assessments which presumably were overridden by the government that decides to commit lives and resources to a trial of arms. Further, it is not unreasonable to suppose that some persons who are *not* prepared to assert a conscientious objection, and instead accept the hardships and risks of military service, may well agree at all points with the objector, yet conclude, as a matter of conscience, that they are personally bound by the decision of the democratic process. The fear of the National Advisory Commission on Selective Service, apparently, is that exemption of objectors to particular wars would weaken the resolve of those who otherwise would feel themselves bound to serve despite personal cost, uneasiness at the prospect of violence, or even serious moral reservations or policy objections concerning the particular conflict.

We need not and do not adopt the view that a categorical, global "interest" in stifling individualistic claims to noncompliance, in respect of duties generally exacted, is the neutral and secular basis of § 6 (j). As is shown by the long history of the very provision under discussion, it is not inconsistent with orderly democratic government for individuals to be exempted by law, on account of special characteristics, from general duties of a burdensome nature. But real dangers—dangers of the kind feared by the Commission—might arise if an exemption were made available that in its nature could not be administered fairly and uniformly over the run of relevant fact situations. Should it be thought that those who go to war are chosen unfairly or capriciously, then a mood of bitterness and cynicism might corrode the spirit of public service and the values of willing performance of a citizen's duties that are the very heart of free government. In short, the considerations men-

tioned in the previous paragraph, when seen in conjunction with the central problem of fairness, are without question properly cognizable by Congress. In light of these valid concerns, we conclude that it is supportable for Congress to have decided that the objector to all war—to all killing in war—has a claim that is distinct enough and intense enough to justify special status, while the objector to a particular war does not.

Of course we do not suggest that Congress would have acted irrationally or unreasonably had it decided to exempt those who object to particular wars. Our analysis of the policies of § 6 (j) is undertaken in order to determine the existence *vel non* of a neutral, secular justification for the lines Congress has drawn. We find that justifying reasons exist and therefore hold that the Establishment Clause is not violated.

### III

Petitioners' remaining contention is that Congress interferes with the free exercise of religion by conscripting persons who oppose a particular war on grounds of conscience and religion. Strictly viewed, this complaint does not implicate problems of comparative treatment of different sorts of objectors, but rather may be examined in some isolation from the circumstance that Congress has chosen to exempt those who conscientiously object to all war.<sup>23</sup> And our holding that § 6 (j) comports with the

<sup>23</sup> We are not faced with the question whether the Free Exercise Clause itself would require exemption of any class other than objectors to particular wars. A free exercise claim on behalf of such objectors collides with the distinct governmental interests already discussed, and at any rate, no other claim is presented. We note that the Court has previously suggested that relief for conscientious objectors is not mandated by the Constitution. See *Hamilton v. Regents*, 293 U. S. 245, 264 (1934); *United States v. MacIntosh*, 283 U. S. 605, 623-624 (1931); cf. *In re Summers*, 325 U. S. 561, 572-573 (1945).

Establishment Clause does not automatically settle the present issue. For despite a general harmony of purpose between the two religious clauses of the First Amendment, the Free Exercise Clause no doubt has a reach of its own. *Abington School District v. Schempp*, 374 U. S. 203, 222-223 (1963).

Nonetheless, our analysis of § 6 (j) for Establishment Clause purposes has revealed governmental interests of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars.

Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government. See *Cantwell v. Connecticut*, 310 U. S. 296, 303-304 (1940); *Jacobson v. Massachusetts*, 197 U. S. 11, 29 (1905); cf. *Cleveland v. United States*, 329 U. S. 14, 20 (1946). To be sure, the Free Exercise Clause bars "government regulation of religious beliefs as such," *Sherbert v. Verner*, 374 U. S. 398, 402 (1963), or interference with the dissemination of religious ideas. See *Fowler v. Rhode Island*, 345 U. S. 67 (1953); *Follett v. McCormick*, 321 U. S. 573 (1944); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943). It prohibits misuse of secular governmental programs "to impede the observance of one or all religions or . . . to discriminate invidiously between religions, . . . even though the burden may be characterized as being only indirect." *Braunfeld v. Brown*, 366 U. S. 599, 607 (1961) (opinion of Warren, C. J.). And even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims. See *id.*; *Sherbert v. Verner*, 374 U. S. 398 (1963). See generally Clark, Guide-

lines for the Free Exercise Clause, 83 Harv. L. Rev. 327 (1969). However, our analysis of § 6 (j) shows that the impact of conscription on objectors to particular wars is far from unjustified. The conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies. Art. I, § 8.

#### IV

Since petitioners' statutory and constitutional claims to relief from military service are without merit, it follows that in Gillette's case (No. 85) there was a basis in fact to support administrative denial of exemption, and that in Negre's case (No. 325) there was a basis in fact to support the Army's denial of a discharge. Accordingly, the judgments below are

*Affirmed.*

MR. JUSTICE BLACK concurs in the Court's judgment and in Part I of the opinion of the Court.



# SUPREME COURT OF THE UNITED STATES

No. 85.—OCTOBER TERM, 1970

Guy Porter Gillette, Petitioner, v. United States.	} On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
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[March 8, 1971]

MR. JUSTICE DOUGLAS, dissenting.

Gillette's objection is to combat service in the Vietnam war, not to wars in general, and the basis of his objection is his conscience. His objection does not put him into the statutory exemption which extends to one "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."<sup>1</sup>

He stated his views as follows:

"I object to any assignment in the United States Armed Forces while this unnecessary and unjust war is being waged, on the grounds of religious belief specifically "Humanism." This essentially means respect and love for man, faith in his inherent goodness and perfectability, and confidence in his capability to improve some of the pains of the human condition."

This position is substantially the same as that of Sisson in *United States v. Sisson*, 297 F. Supp. 902, appeal dismissed, 399 U. S. 267, where the District Court summarized the draftee's position as follows:

" . . . Sisson's table of ultimate values is moral and ethical. It reflects quite as real, pervasive, durable,

<sup>1</sup> Section 6 (j), Military Selective Service Act of 1967, 50 U. S. C. § 456 (j) (1964 ed., Supp. IV).



and commendable a marshalling of priorities as a formal religion. It is just as much a residue of culture, early training, and beliefs shared by companions and family. What another derives from the discipline of a church, *Sisson* derives from the discipline of conscience." 297 F. Supp., at 905.

There is no doubt that the views of Gillette are sincere, genuine, and profound. The District Court in the present case faced squarely the issue presented in *Sisson* and being unable to distinguish the case on the facts, refused to follow *Sisson*.

The question, can a conscientious objector, whether his objection be rooted in "religion" or in moral values, be required to kill? has never been answered by the Court.<sup>2</sup> *Hamilton v. Regents*, 293 U. S. 245, did no more than hold that the Fourteenth Amendment did not require a State to make its university available to one who would not take military training. *United States v. Macintosh*, 283 U. S. 605, denied naturalization to a person who "would not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified." *Id.*, at 613. The question of compelling a man to kill against his conscience was not squarely involved. Most of the talk in the majority opinion concerned "serving in the armed forces of the Nation in time of war." *Id.*, at 623. Such service can of course take place in noncombatant roles. The ruling was that such service is "dependent upon the will of

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<sup>2</sup> See Powell, *Conscience and the Constitution*, in *Democracy and National Unity* (W. Hutchison ed. 1941).

It is probably a universal truth that "the one thing which authority, whether political, social, religious or economic, tends instinctively to fear is the insistence of conscience." Mehta, *The Conscience of a Nation or Studies in Gandhism*. (Calcutta, 1933), p. ii.

Congress and not upon the scruples of the individual, except as Congress provides." *Ibid.* The *dicta* of the Court in the *Macintosh* case squint towards the denial of Gillette's claim, though as I have said, the issue was not squarely presented.

Yet if *dicta* are to be our guide, my choice is the *dicta* of Chief Justice Hughes who, dissenting in *Macintosh*, spoke for Holmes, Brandeis, and Stone:

"Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If, while recognizing the power of Congress, the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification." *Id.*, at 635.

I think the Hughes' view is the constitutional view. It is true that the First Amendment speaks of the free exercise of religion not of the free exercise of conscience or belief. Yet conscience and belief are the main ingredients of First Amendment rights. They are the bedrock of free speech as well as religion. The implied

First Amendment right of "conscience" is certainly as high as the "right of association" which we recognized in *Shelton v. Tucker*, 364 U. S. 479, and *NAACP v. Alabama*, 357 U. S. 449. Some indeed have thought it higher.<sup>3</sup>

Conscience is often the echo of religious faith. But, as this case illustrates, it may also be the product of travail, meditation, or sudden revelation related to a moral comprehension of the dimensions of a problem, not to a religion in the ordinary sense.

Tolstoy<sup>4</sup> wrote of a man "who, as he himself says, is not a Christian, and who refuses military service, not from religious motives, but from motives of the simplest kind, motives intelligible and common to all men, of whatever religion or nation, whether Catholic, Moham-medan, Buddhist, Confucian, whether Spaniards or Japanese.

"Van de Veer refuses military service, not because he follows the commandment. 'Thou shalt do no murder,' not because he is a Christian, but because he holds murder to be opposed to human nature."

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<sup>3</sup> See Konvitz, *Religious Liberty and Conscience* 106 (1968); Redlich and Feinberg, *Individual Conscience and the Selective Service Objector*, 44 N. Y. U. L. Rev. 875, 891 (1969):

"Free expression and the right of personal conscientious belief are closely intertwined. At the core of the first amendment's protection of individual expression, is the recognition that such expression represents the oral or written manifestation of conscience. The performance of certain acts, under certain circumstances, involves such a crisis of conscience as to invoke the protection which the first amendment provides for similar manifestations of conscience when expressed in verbal or written expressions of thought. The most awesome act which any society can demand of a citizen's conscience is the taking of a human life."

<sup>4</sup> Tolstoy's *Writings On Civil Disobedience and Nonviolence* 12 (1967).

Tolstoy<sup>5</sup> goes on to say:

"Van de Veer says he is not a Christian. But the motives of his refusal and action are Christian. He refuses because he does not wish to kill a brother man; he does not obey, because the commands of his conscience are more binding upon him than the command of men . . . . Thereby he shows that Christianity is not a sect or creed which some may profess and others reject; but it is naught else than a life's following of that light of reason which illumines all men . . . .

"Those men who now behave rightly and reasonably do so, not because they follow prescriptions of Christ, but because that line of action which was pointed out eighteen hundred years ago has now become identified with human conscience."

The "sphere of intellect and spirit," as we described the domain of the First Amendment in *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 642, was recognized in *United States v. Seeger*, 380 U. S. 163, where we gave a broad construction to the statutory exemption of those who by their religious training or belief are conscientiously opposed to participation in war in any form. We said: "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by

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<sup>5</sup> *Id.*, at 15-16. And see Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327, 337 (1969):

"The argument is not merely that avoiding compulsion of a man's conscience produces the greatest good for the greatest number, but that such compulsion is itself unfair to the individual concerned. The moral condemnation implicit in the threat of criminal sanctions is likely to be very painful to one motivated by belief. Furthermore, the cost to a principled individual of failing to do his moral duty is generally severe, in terms of supernatural sanction or the loss of moral self-respect."

the God of those admittedly qualifying for the exemption comes within the statutory definition." *Id.*, at 176.<sup>6</sup>

*Seeger* does not answer the present question as Gillette is not "opposed to participation in war in any form."

But the constitutional infirmity in the present Act seems obvious once "conscience" is the guide. As Chief Justice Hughes said in the *Macintosh* case:

"But, in the forum of conscience, duty to a moral power higher than the State has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." 283 U. S., at 633-634.

The law as written is a species of those which show an invidious discrimination in favor of religious persons and against others with like scruples. MR. JUSTICE BLACK once said: "The First Amendment has lost much if the religious follower and the athiest<sup>7</sup> are no longer to be judicially regarded as entitled to equal justice under law." *Zorach v. Clauson*, 343 U. S. 306, 320 (dissenting). We

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<sup>6</sup> In *Welch v. United States*, 398 U. S. 333, four Justices elaborated on *Seeger*, stating:

"The Court [in *Seeger*] made it clear that these sincere and meaningful beliefs that prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts of religion. . . . What is necessary under *Seeger* for a registrant's conscientious objection to all war to be 'religious' within the meaning of § 6 (j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions." *Id.*, at 339-340.

<sup>7</sup> Article VI of the Constitution provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." *Torcoro v. Watkins*, 367 U. S. 488, upheld the right of a nonbeliever to hold public office.

said as much in our recent decision in *Epperson v. Arkansas*, 393 U. S. 97, where we struck down as unconstitutional a state law prohibiting the teaching of the doctrine of evolution in the public schools:

"Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Id.*, 103-104.

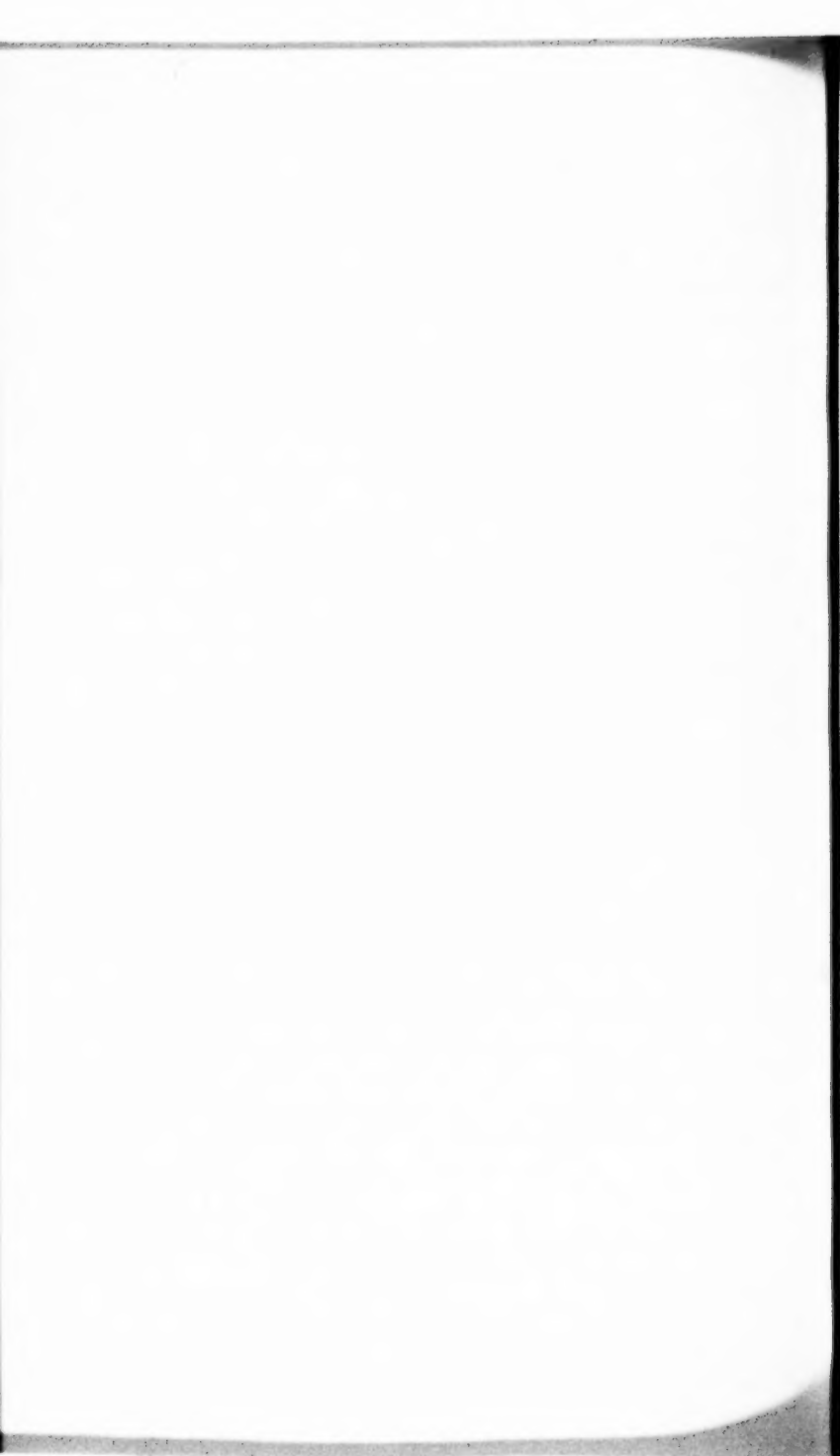
While there is no Equal Protection Clause in the Fifth Amendment, our decisions are clear that invidious classifications violate due process. *Bolling v. Sharpe*, 347 U. S. 497, 500, held that segregation by race in the public schools was an invidious discrimination, and *Schneider v. Rusk*, 377 U. S. 163, 168-169, reached the same result based on penalties imposed on naturalized, not native-born, citizens. A classification of "conscience" based on a "religion" and a "conscience" based on more generalized, philosophical grounds is equally invidious by reason of our First Amendment standards.

I had assumed that the welfare of the single human soul was the ultimate test of the vitality of the First Amendment.

This is an appropriate occasion to give content to our dictum in *Board of Education v. Barnette*, *supra*, at 642:

". . . freedom to differ is not limited to things that do not matter much . . . . The test of its substance is the right to differ as to things that touch the heart of the existing order."

I would reverse this judgment.



# SUPREME COURT OF THE UNITED STATES

No. 325.—OCTOBER TERM, 1970

Louis A. Negre, Petitioner,	}	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
v.		
Stanley R. Larsen et al.		

[March 8, 1971]

MR. JUSTICE DOUGLAS, dissenting.

I approach the facts of this case with some diffidence, as they involve doctrines of the Catholic Church in which I was not raised. But we have on one of petitioner's briefs an authoritative lay Catholic scholar, Dr. John T. Noonan, Jr., and from that brief I deduce the following.

Under the doctrines of the Catholic Church a person has a moral duty to take part in wars declared by his government so long as they comply with the tests of his church for just wars.<sup>1</sup> Conversely, a Catholic has a moral duty not to participate in unjust wars.<sup>2</sup>

<sup>1</sup> The theological basis for this was explained by Pope John XXIII in Part II of *Pacem in Terris*, ¶ 46: "Human society can be neither well-ordered nor prosperous unless it has some people invested with legitimate authority to preserve its institutions. . . . These however derive their authority from God, as St. Paul teaches in the words, *There exists no authority except from God*. These words of St. Paul are explained thus by St. John Chrysostom: . . . *What I say is, that it is the divine wisdom and not mere chance, that has ordained that there should be government, that some should command and others obey*." ¶ 50 adds: "When in fact, men obey their rulers it is not at all as men that they obey them, but through their obedience it is God . . . since He has decreed that men's dealings with one another should be regulated by an order which He himself has established."

<sup>2</sup> "Since the right to command is required by the moral order and has its source in God, it follows that if civil authorities pass laws or command anything opposed to the moral order and consequently con-



The Fifth Commandment, "Thou shall not kill," provides a basis for the distinction between just and unjust wars. In the 16th century Francisco Victoria, Dominican master of the University of Salamanca and pioneer in international law, elaborated on the distinction. "If a subject is convinced of the injustice of a war, he ought not to serve in it, even on the command of his prince. This is clear, for no one can authorize the killing of an innocent person." He realized not all men had the information of the prince and his counsellors on the causes of a war, but where "the proofs and tokens of the injustice of the war may be such that ignorance would be no excuse even to the subjects" who are not normally informed, that ignorance will not be an excuse if they participate.<sup>3</sup> Well over 400 years later, today, the Baltimore Catechism makes an exception to the Fifth Commandment for a "soldier fighting in a just war."<sup>4</sup>

No one can tell a Catholic that this or that war is either just or unjust. This is a personal decision that an individual must make on the basis of his own conscience after studying the facts.<sup>5</sup>

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trary to the will of God, neither the laws made nor the authorization granted can be binding on the consciences of the citizens, *since God has more right to be obeyed than men.*" *Id.*, at ¶ 51.

<sup>3</sup> De Indis Relectio Posterior, sive De iure Belli Hispanorum in Barbados, translated in *Classics of International Law* 173-174 (Nys ed. 1917).

<sup>4</sup> P. 205 (Official Rev. ed. 1949).

<sup>5</sup> Pope Paul VI in § 16 of the Pastoral Constitution states: "Deep within his conscience, man discovers a law which he has not laid upon himself but which he must obey. Its voice, ever calling him to love and to do what is good and avoid evil, tells him inwardly at the right moment to do this or to shun that. For man has in his heart a law written by God. His dignity lies in observing this law, and by it he will be judged."

A. Fagothey, *Right and Reason: Ethics in Theory and Practice* 38 (1967) states: "Hence a certain conscience must be obeyed, not only when it is correct, but even when it is invincibly erroneous [unreal-

Like the distinction between just and unjust wars, the duty to obey conscience is not a new doctrine in the Catholic Church. When told to stop preaching to the Sanhedrin, to which he was subordinate by law, "Peter replied for himself and the apostles, 'We must obey God rather than men.'"<sup>6</sup> That duty has not changed. Pope Paul VI has expressed it as follows: "On his part, man perceives and acknowledges the imperatives of the divine law through the mediation of the conscience. In all his activity a man is bound to follow his conscience faithfully, in order that he may come to God, for whom he was created."<sup>7</sup>

While the fact that the ultimate determination of whether a war is unjust rests on individual conscience, the Church has provided guides. Francisco Victoria referred to "killing of an innocent person." World War II had its impact on the doctrine. Writing shortly after

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ized error]. Conscience is the only guide a man has for the performance of concrete actions here and now. But an invincibly erroneous conscience cannot be distinguished from a correct conscience. Therefore if one were not obliged to follow a certain but invincibly erroneous conscience, we should be forced to the absurd conclusions that one would not be obliged to follow a certain and correct conscience." On this matter § 16 of the Pastoral Constitution adds: "Yet it often happens that conscience goes astray through ignorance which it is unable to avoid, but under such circumstances it does not lose its dignity. This cannot be said of the man who takes little trouble to find out what is true and good."

<sup>6</sup> Acts 5:29.

<sup>7</sup> Declaration on Religious Freedom I:3 in Documents of Vatican II 681 (1966). See also "Human Life in Our Day" issued by the National Conference of Catholic Bishops (Nov. 15, 1968): "Whether or not such modifications in our laws are in fact made, we continue to hope that, in the all-important issues of war and peace, all men will continue to follow their consciences. We can do no better than to recall, as did the Vatican Council, 'the permanent binding force of universal natural law and its all embracing principles, to which man's conscience itself gives ever more emphatic voice.'"

the war Cardinal Ottaviani stated "modern wars can never fulfill those conditions which (as we stated earlier on in this essay) govern—theoretically—a just and lawful war. Moreover, no conceivable cause could ever be sufficient justification for the evils, the slaughter, the destruction, the moral and religious upheavals which war today entails. *In practice, then, a declaration of war will never be justifiable.*"<sup>8</sup> The full impact of the horrors of modern war were emphasized in the Pastoral Constitution announced by Vatican II:

"The development of armaments by modern science has immeasurably magnified the horrors and wickedness of war. Warfare conducted with these weapons can inflict immense and indiscriminate havoc which goes far beyond the bounds of legitimate defense. Indeed, if the kind of weapons now stocked in the arsenals of the great powers were to be employed to the fullest, the result would be the almost complete reciprocal slaughter of one side by the other, not to speak of the widespread devastation that would follow in the world and the deadly after-effects resulting from the use of such arms.

"All of these factors force us to undertake a completely fresh reappraisal of war. . . .

"It is one thing to wage a war of self-defense; it is quite another to seek to impose domination on another nation. . . ."

The Pastoral Constitution announced that "every act of war directed to the indiscriminate destruction of whole cities or vast areas with their inhabitants is a crime against God and man which merits firm and unequivocal condemnation."<sup>9</sup>

<sup>8</sup> The Future of Offensive War, 30 Blackfriars 415, 420 (1949).

<sup>9</sup> Pastoral Constitution ¶¶ 79, 80.

Louis Negre is a devout Catholic. In 1951 when he was four, his family immigrated to this country from France.<sup>10</sup> He attended Catholic schools in Bakersfield, California, until graduation from high school. Then he attended Bakersfield Junior College for two years. Following that he was inducted into the Army.

At the time of his induction he had his own convictions about the Vietnam war and the Army's goals in the war. He wanted, however, to be sure of his convictions. "I agreed to myself that before making any decision or taking any type of stand on the issue, I would permit myself to see and understand the Army's explanation of its reasons for violence in Vietnam. For, without getting an insight on the subject, it would be unfair for me to say anything, without really knowing the answer."<sup>11</sup>

On completion of his advanced infantry training, "I knew that if I would permit myself to go to Vietnam I would be violating my own concepts of natural law and would be going against all that I had been taught in my religious training." Negre applied for a discharge as a conscientious objector. His application was denied. He then refused to comply with an order to proceed for shipment to Vietnam. A general court martial followed,

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<sup>10</sup> Petitioner suggests that one of the reasons his parents left France was their opposition to France's participation in the Indo-China war.

<sup>11</sup> See n. 5 *supra*. Fagothey, *supra* n. 5, at 37 states: "What degree of certitude is required? It is sufficient that the conscience be prudentially certain. Prudential certitude is not absolute but relative. It excludes all *prudent* fear that the opposite may be true, but it does not rule out imprudent fears based on bare possibilities. the reasons are strong enough to satisfy a normally prudent man in an important matter, so that he feels safe in practice though there is a theoretical chance of his being wrong. He has taken every reasonable precaution, but cannot guarantee against rare contingencies and freaks of nature."

but he was acquitted. After that he filed this application for discharge as a conscientious objector.

Negre is opposed under his religious training and beliefs to participation in any form in the war in Vietnam. His sincerity is not questioned. His application for a discharge, however, was denied because his religious training and beliefs lead him to oppose only a particular war<sup>12</sup> which according to his conscience was unjust.

For the reasons I have stated in my dissent in the *Gillette* case decided this day, I would reverse the judgment.

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<sup>12</sup> "For those middle-aged people who find themselves baffled by the current widespread resistance to the draft, a Stanford University student has provided a useful parallel.

"Addressing a hearing of the Senate Armed Service Committee . . . , Peter Knutson said that 'If, during the course of the Second World War, America had entered on the side of Hitler's Germany, would you have allowed yourself to be drafted? Would you have blindly said my country right or wrong?'

"That is about as well as the anti-draft cause has ever been stated. . . .

"It may seem far-fetched to suppose that America ever would have fought on the side of Hitler, but that too is beside the point. If today's World War II veteran will try to imagine what he might have done had he been drafted under those circumstances, he will be able to understand some part of the dilemma that the Vietnam war has imposed on this generation of draftees. It has been a real dilemma breeding powerful frustrations, and its residues will long outlast the war."—L. H.—Lewiston (Ida.) Tribune.

